Supreme Court, U.S.
FILED
DEC 6 1990
JOSEPH F. SPANIOL, JR.
CLERK

90-892

No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

THE CITY OF SEATTLE,
Petitioner,

v.

FIRST COVENANT CHURCH OF SEATTLE, WASHINGTON,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

PETITION FOR A WRIT OF CERTIORARI

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December 1990

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QUESTION PRESENTED

Does the mere designation of a church building as a landmark, with resulting restrictions on the destruction or alteration of the building's exterior, violate the Free Exercise Clause of the First Amendment?

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PETITION FOR A WRIT OF CERTIORARI

The City of Seattle respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of the State of Washington in this case.[1]

OPINIONS BELOW

The decision of the Washington Supreme Court is reported at 114 Wash. 2d 392, 787 P.2d 1352 (1990), and is reproduced in the Appendix ("App.") at 1a-27a. The order of the Washington Court of Appeals certifying a direct appeal to the Washington Supreme Court and the ruling of the Washington Supreme Court accepting certification are unreported and are reproduced at App. 28a-29a. The decisions of the Superior Court for King County, Washington are unreported and are reproduced at App. 30a-40a.

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[1] Pursuant to Rule 29.1 of the Rules of this Court, petitioner states that it is a municipality and, as such, has no parent companies or subsidiaries.

JURISDICTION

The judgment of the Washington Supreme Court was entered on March 22, 1990. Petitioner's motion for reconsideration was denied on September 12, 1990. The petition for a writ of certiorari is therefore due on December 11, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) (1988).

CONSTITUTIONAL PROVISIONS AND ORDINANCES INVOLVED

The First Amendment to the Constitution of the United States provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

The Seattle Landmarks Preservation Ordinance (Ordinance 106348), codified at Seattle Municipal Code ("SMC") 25.12 *et seq.* (1977), and Ordinance 112425 (1985) of the City of Seattle are reproduced at App. 42a-84a.

STATEMENT

A. Statement of Facts

1. *The Landmarks Ordinance.* In 1977, petitioner, the City of Seattle, recognizing the need for a comprehensive scheme to preserve its historic, cultural and architectural heritage, adopted a Landmarks Preservation Ordinance authorizing the designation and protection of landmarks. SMC 25.12 *et seq.* (App. 42a-81a). The ordinance was based on findings of the City Council that the preservation and perpetuation of landmark objects and sites were "required in the interest of prosperity, civic pride and

general welfare of the people," and that "the economic, cultural and aesthetic standing of [the] City cannot be maintained or enhanced by disregarding the heritage of the City and by allowing the unnecessary destruction or defacement of such cultural assets." SMC 25.12.020(A) (App. 42a). Among the stated purposes of the ordinance were: (1) to designate, preserve and protect those objects and sites which reflect significant elements of the City's cultural, aesthetic, social, architectural and historic heritage; (2) to foster civic pride in the beauty and accomplishments of the past; and (3) to protect and enhance the City's attraction to tourists and visitors. SMC 25.12.020(B) (App. 42a).

Under the Landmarks Preservation Ordinance, an object, site or improvement may be designated for landmark preservation if it is more than twenty-five years old and "has significant character, interest or value, as part of the development, heritage or cultural characteristics of the City, state or nation[.]" SMC 25.12.350 (App. 53a). In order to qualify for landmark designation, a structure must fit within at least one of six categories, two of which are pertinent here: (a) structures that "embod[y] the distinctive visible characteristics of an architectural style, or period, or of a method of construction"; and (b) structures that, "[b]ecause of prominen[t] . . . spatial location, contrasts of siting, age or scale, [are] . . . easily identifiable visual feature[s] of [their] neighborhood or the City and contribute[] to the distinctive quality or identity of such neighborhood or the City." SMC 25.12.350(D), (F) (App. 53a, 54a).

The ordinance established a comprehensive procedural framework for designating and protecting landmarks. A Landmarks Preservation Board (the "Board") was created and charged with the responsibility of identifying objects, improvements and sites worthy of preserva-

tion. SMC 25.12.270 (App. 49a).[2] In order to be considered for designation, a structure must first be nominated for landmark status, and the Board must approve the nomination at a public meeting. SMC 25.12.370; 25.12.380 (App. 54a; 55a). If the Board approves the nomination, it then holds a public hearing to receive evidence and hear oral argument on whether the site, improvement or object meets the ordinance criteria and whether it merits landmark designation. SMC 25.12.420 (App. 57a). If the Board approves the designation, the staff of the Board and the property owner attempt to agree on controls to protect the landmark features of the property (SMC 25.12.490) (App. 59a-60a); if agreement is not possible or the Board does not approve an agreement, the matter is referred to a hearing examiner to recommend controls. SMC 25.12.530 (App. 61a). The Board or hearing examiner then recommends the controls to the City Council. SMC 25.12.510; 25.12.610 (App. 60a; 65a). If the City Council accepts the recommendation, a further ordinance is enacted designating the landmark and requiring the landmark owner to secure a Certificate of Approval from the Board for any alteration or demolition of the structure's historically significant features. SMC 25.12.650 (App. 66a-67a).

2. *The Building.* Respondent, First Covenant Church of Seattle, was organized by Swedish immigrants in 1889. The present church building, designed by architect John Creutzer, was erected in 1910-11 and is an important architectural landmark. (App. 85a-88a). The church's most readily identifiable feature is its ribbed elliptical dome and classical cupola, which rise from behind a parapet wall. (App. 87a). The church is one of only three domed structures of its type remaining in

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[2] The Board consists of eleven members and is required to include at least two architects, two historians, one representative from the City Planning Commission, one structural engineer, one representative from the field of real estate management, and one representative from the field of finance. SMC 25.12.270 (App. 49a).

Seattle. (App. 88a). The building is a significant element of the City's Swedish heritage, and enjoys a prominent location. *Id.* As noted in the church's landmark nomination, the building, in its location, "contributes to the distinctive identity of the surrounding neighborhood." *Id.*

3. *Designation of the Building.* The Board nominated the church building as a landmark on October 15, 1980. (App. 82a). After a public hearing on January 7, 1981, the Board voted to approve the landmark designation and voted on April 22, 1981 to adopt controls on alterations to the exterior of the church building. The matter was referred to a hearing examiner who, after a hearing, recommended on July 2, 1981 that the exterior of the church be preserved. (App. 91a-95a). On February 26, 1985, the Seattle City Council's Land Use Committee affirmed the recommendations of the Board and the Hearing Examiner. (App. 82a).

On September 17, 1985, the Seattle City Council accepted these recommendations and enacted an ordinance (No. 112425) (App. 82a-84a) acknowledging the designation of the First Covenant church building as a landmark and requiring the respondent to obtain a Certificate of Approval before undertaking certain alterations to the building's exterior. The City Council concluded that the church building satisfied two criteria under the Landmarks Preservation Ordinance: (1) it "embodies the distinctive visible characteristics of an architectural style, period or of a method of construction," and (2) because of the building's prominent location, "it is an easily identifiable visual feature of its neighborhood or the city and contributes to the distinctive quality or identity of such neighborhood or the city." (App. 83a). Acknowledging the religious purpose of the structure, the City Council included the following provision:

> Nothing herein shall prevent any alteration of the exterior when such alterations are necessitated by

changes in liturgy, it being understood that the owner is the exclusive authority on liturgy and is the decisive party in determining what architectural changes are appropriate to the liturgy. When alterations, necessitated by changes in liturgy are proposed, the owner shall advise the Landmarks Preservation Board in writing of the nature of the proposed alterations and the Board shall issue a Certificate of Approval.

Ordinance 112425, Section 2. (App. 83a).

B. Proceedings Below

1. *The Trial Court.* On January 21, 1986, respondent brought suit in Superior Court, King County, seeking a declaratory judgment that the Landmarks Preservation Ordinance does not apply to churches or, if it does apply, that it violates the freedom of religion provisions of the Washington Constitution and that the ordinance designating the First Covenant church building as a landmark was void.[3] On August 25, 1986, respondent filed a motion for partial summary judgment contending, *inter alia*, that the ordinances violated the Free Exercise Clause of the First Amendment to the United States Constitution. On October 8, 1986, the Superior Court denied respondent's motion for partial summary judgment, holding that church buildings are subject to the Landmarks Ordinance and that the federal and state constitutional challenges were premature "[u]nless and until the city undertakes to apply the ordinance in a manner that in some way impinges upon the undoubted constitutional right of the plaintiff to operate its religious property without interference from the City." (App. 39a). On October 1, 1987, the Superior Court denied respondent's second motion for partial summary

[3] Respondent has no current plans to modify or alter the exterior of the church building. (App. 38a). Respondent's "opposition to designation is based on the possibility that it may wish to make exterior alterations at some time in the future." (App. 99a).

judgment and granted petitioner's motion for partial summary judgment. (App. 32a-35a). On October 27, 1988, the Superior Court dismissed respondent's remaining causes of action. (App. 30a-31a). Respondent appealed the trial court's decisions to the Court of Appeals, which on August 7, 1989 certified a direct appeal to the Washington Supreme Court. (App. 29a).

2. *The Washington Supreme Court.* In a 5-4 decision, the Washington Supreme Court reversed. The majority rejected the City's argument that a constitutional challenge was premature prior to any occasion for enforcing the ordinance. (App. 4a-7a).[4] The majority then held that Seattle's two ordinances infringed respondent's First Amendment right to free exercise of religion. (App. 7a-18a).[5] The majority interpreted this Court's decisions as

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[4] The court focused on several "impacts" that respondent alleged occurred immediately upon the designation of the building as a landmark: interference with the respondent's freedom to alter the building's exterior; a need for secular approval of any proposed alterations "requiring additional paperwork, negotiations and hearings"; a limitation on the respondent's ability to sell its property; and the "uncertainty" of discretionary approval in planning any exterior change. (App. 5a). In addition, although there was no finding of fact, the court credited an affidavit filed in the trial court in opposition to petitioner's motion for summary judgment, stating that landmark designation "resulted in a depreciation in the market value of the property from $700,000 to $400,000." *Id.*

[5] The Washington Supreme Court referred twice to the freedom of religion provision of the Washington Constitution. *See* App. 8a; 18a. However, the court relied exclusively on its understanding of this Court's First Amendment free exercise jurisprudence in reaching its decision. Indeed, the one Washington Supreme Court decision alluded to in the majority's freedom of religion discussion, *Witters v. State Comm'n for the Blind*, 112 Wash. 2d 363, 371, 771 P.2d 1119, 1122-23, *cert. denied*, 110 S. Ct. 147 (1989), is cited solely for the state court's analysis of this Court's free exercise decisions. (App. 8a; 18a). Plainly, "the adequacy and independence of any possible state law ground is not clear from the face of the opinion," *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983), and review of the federal question by this Court is appropriate.

requiring strict scrutiny analysis because the "ordinances at issue require the church to seek secular approval of any proposed change to the church's facade requiring a building permit" (App. 13a), a requirement the court described as "potentially affecting the Church's practice of its religion." (App. 14a). The court then held that landmark protection is not a compelling state interest and therefore could not justify this potential burden. (App. 16a). The majority rejected petitioner's contention that any potential burden was eliminated by the "liturgy" exception, which the City had said would exempt any change respondent might "choose[] to make to the exterior of the structure for religious purposes" (App. 26a); the majority found the exception "a vague and unworkable criterion" (App. 15a) that would not eliminate the need for respondent to deal with secular authorities.[6]

In a concurring opinion, three justices, although joining the majority opinion, stated that in their view the pertinent burden on respondent was the alleged reduction in the market value of its property attributable to the ordinance. Although recognizing that this Court's decision in *Jimmy Swaggart Ministries v. Board of Equalization*, 110 S. Ct. 688 (1990), "shows that a financial burden does not constitute a per se free exercise violation" (App. 21a), the concurring justices declined, without explanation, to apply *Swaggart* to this case.

Four justices dissented. They concluded that the court should simply confirm the City's concession that any changes "for religious purposes" were expressly exempted from landmark review. (App. 26a). They rejected as premature any challenge to the administrative

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[6] In so holding, the majority ignored this Court's ruling in *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 15 (1988), that "it would be quite unusual if the [City] 'could not construe its own statutory mandate in the light of federal constitutional principles'" (quoting *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 629 (1986)).

burden imposed by the statute and said that in any event:

> [T]o suggest that the requirement the church and landmarks board "shall jointly explore such possible alternative design solutions as may be appropriate or necessary to preserve the designated features of the landmark" . . . is an excessive burden on the "free exercise of religion" is to trivialize the great protections of the First Amendment.

(App. 27a).

Petitioner's petition for reconsideration was denied without comment on September 12, 1990.

REASONS FOR GRANTING THE PETITION

This case presents the important question whether landmark-designation legislation can constitutionally be applied to buildings owned by religious institutions. The Washington Supreme Court struck down, as inconsistent with the Free Exercise Clause of the First Amendment, petitioner's efforts to preserve and protect the exterior of a church as an architectural, aesthetic and historic landmark.[7] Applying strict scrutiny analysis, the state court ruled that landmark preservation "is not a compelling state interest" (App. 17a) and that the burden of potentially having to seek secular approval of changes to a church exterior, together with the alleged reduction of the market value of church property as a result of landmark designation, outweighed any interest in protecting a landmark. If it were correct, the state court's interpretation of the First Amendment would make landmark protection of church buildings virtually impossible.[8]

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[7] As noted in n.5, *supra*, the Washington Supreme Court also referred to the freedom of religion clause of the Washington State Constitution but did not clearly indicate reliance on an adequate and independent state ground. *See Michigan v. Long*, 463 U.S. at 1040-41.

[8] Indeed, the rationale of the decision extends beyond buildings used for religious purposes and beyond landmark regulation. Struc-

This Court should review this decision for three reasons. First, the decision is in direct conflict with the Second Circuit's recent decision in *St. Bartholomew's Church v. City of New York*, 914 F.2d 348 (2d Cir. 1990). In *St. Bartholomew's Church*, the court dismissed a free exercise challenge to New York City's Landmark Ordinance as applied to a building owned by a church, explicitly rejecting the same arguments relied upon by the Washington Supreme Court here.

Second, the decision is inconsistent with this Court's free exercise cases. The Washington Supreme Court held that application to a church of a neutral regulation of general application, even one that is not alleged to compel (or prohibit) any action that the church's religion forbids (or commands), is subject to strict scrutiny analysis. That decision is flatly inconsistent with this Court's recent decisions, including *Employment Division v. Smith*, 110 S. Ct. 1595 (1990), *Jimmy Swaggart Ministries v. Board of Equalization*, 110 S. Ct. 688 (1990), and *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451-52 (1988).

Finally, this case presents a constitutional issue of general importance. Every state, and over five hundred municipalities, have passed legislation to preserve and protect historic structures. *See Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 107 (1978). Inconsistency and confusion over the constitutionality of applying such legislation to the large number of historic religious structures are a matter of significant concern not only to the parties here but also to every community that seeks through landmark legislation to preserve its physical heritage.

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tures used by a religious organization exclusively for secular purposes also could not be landmarked, since doing so might require the organization to deal with secular authorities and might reduce the value of the structures. And every form of land use regulation that had these consequences would also be subject to strict scrutiny.

1. *Conflict of Decisions.* The Washington Supreme Court and the Second Circuit reached opposite answers to the question whether the designation of a church building as a historic landmark violates the Free Exercise Clause. In *St. Bartholomew's Church v. City of New York*, 914 F.2d 348 (2d Cir. 1990), the New York City Landmarks Preservation Commission had denied a church's application to demolish a landmarked building, the church's "Community House," in order to permit the church to construct a 47-story office tower in its place. The church argued that New York City's Landmarks Law, facially and as applied to the church, violated the church's freedom of religion by involving the government in the church's decisions as to the use of its property and by denying the church the opportunity to exploit fully the financial value of its property. *Id.* at 353-54.

In contrast to the Washington Supreme Court, the Second Circuit rejected these arguments. Citing recent free exercise decisions of this Court, the Second Circuit observed that "while the government may not coerce an individual to adopt a certain belief or punish him for his religious views, it may restrict certain activities associated with the practice of religion pursuant to its general regulatory powers." *Id.* at 354. The critical distinction, the court noted, is "between a neutral generally applicable law that happens to bear on religiously motivated action, and a regulation that restricts certain conduct because it is religiously oriented." *Id.* (citing *Smith*, 110 S. Ct. at 1599). New York City's landmark legislation (like Seattle's) is a "facially neutral regulation of general applicability within the meaning of Supreme Court decisions," *St. Bartholomew's Church*, 914 F.2d at 354; under this Court's decision in *Smith*, the First Amendment does not restrict the application of such regulatory statutes to religious institutions and conduct. *Id.*[9]

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[9] In contrast to St. Bartholomew's Church, which had been denied permission to demolish a landmarked building, respondent here has

The Second Circuit acknowledged that the Landmarks Law "drastically restricted the Church's ability to raise revenues." *Id.* at 355. The court recognized, however, that the decisions of this Court foreclose a reading of the First Amendment that would elevate such a financial "burden" to a level of constitutional significance. In contrast to the majority (particularly the concurring opinion) of the Washington Supreme Court, the Second Circuit ruled: "[N]eutral regulations that diminish the income of a religious organization do not implicate the free exercise clause. . . . The central question in identifying an unconstitutional burden is whether the claimant has been denied the ability to practice his religion or coerced in the nature of those practices." *Id.* (citing *Jimmy Swaggart Ministries v. Board of Equalization*, 110 S. Ct. 688 (1990); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451-52 (1988); and *Hernandez v. Commissioner*, 109 S. Ct. 2136, 2149 (1989)). Since St. Bartholomew's Church had failed to "show discriminatory motive, coercion in religious practices, or the inability to carry out its religious mission in its existing facilities," *St. Bartholomew's Church*, 914 F.2d at 355, the court found no free exercise violation.

St. Bartholomew's Church had also suggested that the Landmarks Law involved an "excessive degree of entanglement between church and state" because it required the church to seek a certificate of appropriateness for certain alterations. *Id.* at 356 n.4. Relying on this Court's decision in *Swaggart*, 110 S. Ct. at 697-99, the Second Circuit rejected this argument, observing: "[t]he only scrutiny of the Church occurred in the proceedings for a certificate of appropriateness, and the matters scrutinized were exclusively financial and architectural. *St. Bartholomew's Church*, 914 F.2d at 356 n.4. The court concluded: "[t]his degree of interaction does not rise to

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challenged its mere designation as a landmark. *Cf. New York State Club Ass'n v. City of New York*, 487 U.S. 1, 11 (1988).

the level of unconstitutional entanglement." *Id.* This conclusion was flatly inconsistent with the Washington Supreme Court's holding that a regulation subjecting a church's possible development and building plans to secular approval violated the First Amendment. (App. 16a).

2. *Conflict With This Court's Free Exercise Jurisprudence.* Review is further warranted in this case because the decision of the Washington Supreme Court is squarely contrary to this Court's free exercise decisions. The state court erred in holding that a neutral regulation of general application can violate the Free Exercise Clause when applied to a church. The court further erred in holding that the administrative and financial burdens imposed by Seattle's landmark legislation were of constitutional significance, requiring the City to justify those burdens by showing a compelling state interest.

a. In *Employment Division v. Smith*, 110 S. Ct. 1595 (1990), this Court rejected the notion—central to the state court's decision here—that application of a neutral, generally applicable regulation to matters touching upon religion implicates the Free Exercise Clause. As this Court observed in *Smith* (which unlike this case involved a religious *practice*), "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Id.* at 1600 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in judgment)). Under *Smith*, a generally applicable statute that is not specifically directed at religious practice is "not susceptible to a free exercise clause challenge." [10]

Seattle's Landmarks Preservation Ordinance is a facially neutral regulation of general applicability. *Cf. St.*

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[10] *Salvation Army v. Department of Community Affairs*, No. 89-5707, 1990 U.S.App. LEXIS 19352 (3d Cir. Nov. 5, 1990) at 16.

Bartholomew's Church, 914 F.2d at 354.[11] The fact that application of this legislation may require a church, like any other owner of a historic property, to deal with secular authorities and may affect the property's market value does not implicate the Free Exercise Clause of the First Amendment. *Smith*, 110 S. Ct. at 1600.

In *Smith*, this Court noted that it has "never held that an individual's religious beliefs excuse him from compliance from an otherwise valid law prohibiting conduct that the state is free to regulate." *Id.* Respondent has not suggested that Seattle's landmark ordinances regulate its religious beliefs—or discriminate against them.[12] Nor has respondent challenged Seattle's power to regulate the alteration of historic and architectural landmarks generally; indeed, the validity of landmark preservation laws was specifically affirmed by this Court in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 107 (1978). Rather, respondent contended—and the state court held—that these "otherwise valid" regulations and prohibitions may not be applied to a religious institution. This argument is foreclosed by *Smith*:

> Respondents urge us to hold, quite simply, that when otherwise prohibitable conduct is accompanied by

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[11] The Seattle ordinance applies to "[a]n object, site or improvement which is more than twenty-five (25) years old . . . if it has significant character, interest or value, as part of the development, heritage or cultural characteristics of the City, state or nation" and falls within one of six identified categories. SMC 25.12.350 (App. 53a). New York City's Landmarks Preservation Law applies similarly to "'[a]ny improvement, any part of which is thirty years old or older, which has a special character or special historical or aesthetic interest or value.'" *St. Bartholomew's Church*, 914 F.2d at 354 (quoting N.Y.C. Admin. Code § 25-302(n) (1986)).

[12] *Cf. Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 132 (1978) (rejecting argument that New York City Landmarks Law was discriminatory, observing that the law "embodies a comprehensive plan to preserve structures of historic or aesthetic interest wherever they might be found in the city").

> religious convictions, not only the convictions but the conduct itself must be free from governmental regulation. We have never held that, and decline to do so now.

Smith, 110 S. Ct. at 1602.[13]

b. Decisions of this Court make it clear that the two "burdens" on free exercise identified by the Washington Supreme Court do not warrant application of strict scrutiny analysis.[14] First, the state court noted that the ordinances would require respondent to "seek secular approval" of any changes proposed in the future to the building's facade, and to negotiate possible alternative design solutions to those changes required by liturgy. (App. 13a). Second, the court credited the allegation that the market value of the church property, as a result of the landmark designation, had depreciated from $700,000 to $400,000. (App. 5a). *See also* App. 21a-25a (Utter, J., concurring).[15] Neither of these "burdens" is of constitutional significance.

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[13] In *Smith*, this Court observed that "[t]he only decisions in which [the Court has] held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action[s] have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press." 110 S. Ct. at 1601. This case does not involve any such "hybrid claim."

[14] *See Swaggart*, 110 S. Ct. at 693 (a neutral regulation may offend the constitutional requirement of neutrality only "if it *unduly* burdens the free exercise of religion") (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972)) (emphasis added); *Hernandez v. Commissioner*, 109 S. Ct. 2136, 2148 (1989) ("[t]he free exercise inquiry asks whether the government has placed a *substantial* burden on the observation of a central religious belief or practice") (emphasis added).

[15] The Washington Supreme Court's figures were based upon an affidavit filed by the church, in superior court, in opposition to petitioner's motion for summary judgment. The issue of whether landmark designation reduced the value of church property was never passed upon by the superior court, which held that the question was not ripe for review. (App. 30a-31a).

(i) *Secular Approval.* The state court found that respondent's right of free exercise was violated by the requirement that it seek secular approval should it wish, in the future, to alter the building's exterior. (App. 13a-16a).[16] Recent decisions of this Court make clear, however, that the interaction contemplated by landmark ordinances between government and the owner of a historic structure should not raise First Amendment concerns. *See Swaggart*, 110 S. Ct. at 697-99 (rejecting argument that on-site inspections, and alleged "layers of administrative . . . proceedings" impermissibly enmeshed the government in religious affairs); *Hernandez v. Commissioner*, 109 S. Ct. 2136, 2147 (1989) (same); *Bowen v. Kendrick*, 487 U.S. 589, 617 (1988) (since the government would not be intruding on the day-to-day operations of religious organization, grant monitoring required by statute did not amount to excessive entanglement); *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 305-06 (1985) (the First Amendment "does not exempt religious organizations from such secular governmental activity as fire inspections and building and zoning regulations").

Respondent did not suggest, nor did the court below hold, that requiring the Church to interact with secular authorities would in any way coerce the church into acting contrary to its religious principles. *Cf. St. Bartholomew's Church*, 914 F.2d at 356 n.4 (requirement that church submit architectural plans to secular review "does not rise to the level of unconstitutional entanglement"). Although indirect coercion or penalties on the free exercise of religion may be subject to scrutiny under the First Amendment, "[t]his does not and cannot imply that incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting

[16] The court observed, for instance, that the regulation would "requir[e] additional paperwork, negotiations and hearings." (App. 5a).

contrary to their religious beliefs, require the government to bring forward a compelling justification for its otherwise lawful actions." *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. at 450-51.

(ii) *Economic Impact.* The First Amendment does not guarantee that "religious groups . . . are free from all financial burdens of government." *Swaggart*, 110 S. Ct. at 694 (quoting *Murdock v. Pennsylvania*, 319 U.S. 105, 112 (1943)). To be sure, if a regulation imposes financial burdens so significant as to "effectively choke off an adherent's religious practices," *Swaggart*, 110 S. Ct. at 697, then the free exercise clause may be implicated. *Cf. Murdock*, 319 U.S. at 115. But as this Court reaffirmed in *Swaggart*, "to the extent that imposition of a generally applicable [regulation] merely decreases the amount of money appellant has to spend on its religious activities, any such burden is not constitutionally significant." 110 S. Ct. at 696 (citing *Hernandez v. Commissioner*, 109 S. Ct. 2136, 2149 (1989)). Respondent has not contended that the alleged reduction in the value of its property has in any way affected (much less "choked off") its ability to carry out its religious mission.

3. *Issue of Public Importance.* Finally, review in this case is warranted in order to provide guidance to lower courts in an area of substantial public importance.[17] The

[17] Similar issues are currently pending in lower courts. *See Society of Jesus in New England v. Boston Landmarks Comm'n*, Nos. 87-3168, 87-4751, 87-6586 (Mass. Super. Ct. Nov. 2, 1989), *appeal docketed*, No. SJC-5415 (Mass. argued Nov. 6, 1990); *cf. Alger v. City of Chicago*, No. 90C2778, 1990 U.S. Dist. LEXIS 12492 (Sept. 19, 1990) (Establishment Clause challenge to landmark ordinance exempting religious buildings dismissed for lack of standing), *motion for reconsideration filed* (N.D. Ill. Oct. 3, 1990). The Washington Supreme Court recognized the national significance of its decision, writing: "[t]he interests of the City and the Church are substantial and a determination by this court as to the constitutionality of the landmarks ordinance will clarify valuable property

decision of the Washington Supreme Court, effectively exempting all properties owned by religious organizations from landmark regulation, is both sweeping and unprecedented. As one commentator has observed, the blanket exclusion of churches and other religious structures from the protection of historic preservation laws would seriously undercut efforts to preserve the physical heritage of our communities:

> The purpose of historic preservation statutes is to preserve irreplaceable buildings having cultural, architectural, or historical significance. Churches often are distinctive or even unique in their architectural design and frequently are historically significant. Therefore, churches often will be designated as historic properties and will play an integral part in any historic preservation program. . . . If churches were excluded from historic districts whenever the congregation invoked first amendment claims, it would be difficult to preserve the unity of a historic district. Undue deference to churches would result in an even more rapid loss of historic structures.

Note, *Applying Historic Preservation Ordinances to Church Property: Protecting the Past and Preserving the Constitution*, 63 N.C.L. REV. 404, 418 (1985).

The public interest in historic preservation is well documented and was affirmed by this Court in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978).[18] The Court noted in *Penn Central* that "all 50

---

rights of churches and their freedom to practice religion. A decision here will be welcomed throughout the United States[.]" (App. 6a).

[18] Historic preservation laws are also rooted in antiquity. Gibbon recounted the efforts of Emperor Majorian (A.D. 453) to preserve the historic structures of ancient Rome:

> The decay of the city had gradually impaired the value of the public works. The circus and theatres might still excite, but they seldom gratified, the desires of the people: the temples which had escaped the zeal of the Christians were no longer inhabited either by gods or men . . . and the stately libraries

States and over 500 municipalities have enacted laws to encourage or require the preservation of buildings and areas with historic or aesthetic importance." *Penn Central*, 438 U.S. at 107. These nationwide efforts were precipitated, in part, by the "widely shared belief that structures with special historic, cultural, or architectural significance enhance the quality of life for all. Not only do these buildings and their workmanship represent the lessons of the past and embody precious features of our heritage, they serve as examples of quality for today." *Id.* at 108.

The Washington Supreme Court has subjected to wholly unwarranted strict scrutiny, and then invalidated, an important aspect of Seattle's attempt to preserve its physical heritage. The decision conflicts squarely with a decision of the Second Circuit and disregards recent rulings of this Court that should have been dispositive. If followed elsewhere, the decision would eliminate a core part of a program deemed important by every state and numerous municipalities. The state court's attempt to define the relationship between the free exercise of religion and the public interest in historic preservation amply warrants this Court's review.

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and halls of justice became useless to an indolent generation whose repose was seldom disturbed either by study or business. . . . Majorian, who had often sighed over the desolation of the city, applied a severe remedy to the growing evil. He reserved to the prince and senate the sole cognisance of the extreme cases which might justify the destruction of an ancient edifice; imposed a fine of fifty pounds of gold . . . on every magistrate who should presume to grant such illegal and scandalous license; and threatened to chastise the criminal obedience of their subordinate officers by a severe whipping and the amputation of both their hands.

2 E. GIBBON, THE DECLINE AND FALL OF THE ROMAN EMPIRE 315 (rev. ed. 1989) (footnote omitted).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 1990

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90-892

(2)

FILED
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JOSEPH F. SPANIOL, JR.
CLERK

No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THE CITY OF SEATTLE,
Petitioner,
v.
FIRST COVENANT CHURCH OF SEATTLE, WASHINGTON,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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Note: The documents included in this Appendix are reproduced as they appear in the originals. To the extent that the original documents include typographical errors, those errors appear here as well.

APPENDIX

THE SUPREME COURT OF WASHINGTON

No. 56377-2
En Banc

FIRST COVENANT CHURCH OF SEATTLE, WASHINGTON,
Appellant,

v.

THE CITY OF SEATTLE,
Respondent.

March 22, 1990

DORE, J.—This is a case of first impression.

First Covenant Church challenges the constitutionality of two separate but interrelated ordinances, the Seattle Landmarks Preservation Ordinance 106348 [1] and Seattle ordinance 112425 designating First Covenant Church a landmark. The Church brought a declaratory judgment action seeking declaration that the Seattle ordinance designating the church a landmark and the Seattle Landmarks Preservation Ordinance as applied to churches were unconstitutional and void. The trial court held that the Church's claim was premature and entered summary judgment in favor of the City. We hold that this case presents a justiciable issue properly presented for declaratory judgment and that the designation ordinance and the Landmarks Preservation Ordinance as applied to churches are unconstitutional as they violate the right of free exercise of religion as guaranteed by the United States and Washington State Constitutions. We reverse.

---

[1] This ordinance is now codified at Seattle Municipal Code 25.12.

FACTS

First Covenant Church of Seattle is a nonprofit Washington corporation. The Church owns and operates the church located at Pike and Bellevue in Seattle which is used exclusively for religious purposes.

In 1977, the City of Seattle adopted the Seattle Landmarks Preservation Ordinance to, *inter alia*,

> designate, preserve, protect, enhance and perpetuate those sites, improvements and objects which reflect significant elements of the City's cultural, aesthetic, social, economic, political, architectural, engineering, historic or other heritage . . . .

SMC 25.12.020(B) (1977). Pursuant to that ordinance, the Landmarks Preservation Board nominated First Covenant Church as a landmark on October 15, 1980. A public hearing was held on January 7, 1981, at which the Church objected to the nomination. Following the hearing, the board voted to approve the designation of the church as a landmark. On April 22, 1981, the board voted to adopt controls to preserve the exterior of the church and recommended to the Seattle City Council that it approve those controls.

The Church and the City were unable to come to an agreement regarding application of the controls and the matter was referred to a hearing examiner. A public hearing was held before an examiner on June 3, 1981, at which the Church objected to designation of the church as a landmark building. On July 2, 1981, the hearing examiner recommended that the city council approve the controls proposed by the board for the preservation of the church facade.

Over 4 years later, September 17, 1985, the city council adopted ordinance 112425 formally designating the church a landmark and placing specific controls upon the Church's ability to alter the structure's exterior. More than 5 years elapsed from the date the board nominated

the church for landmark status until the city council passed the designating ordinance. Throughout that entire period the Church remained subject to the controls proposed by the board and the landmarks ordinance's provisions requiring the landmark owner to obtain a Certificate of Approval for structural changes necessitating a building permit.[2]

The Church brought a declaratory judgment action against the City in January 1986, seeking declaration that application of the Seattle Landmarks Preservation Ordinance to churches was unconstitutional and that the ordinance designating First Covenant Church a landmark was void. The Church then moved for summary judgment on the issues of the landmarks ordinance's constitutionality as applied to churches. The City filed a cross motion for partial summary judgment on the same issues. The trial court entered an order denying the Church's motion and granting the City partial summary judgment without prejudice to the Church's remaining contentions of law and fact. The trial court held that the landmarks ordinance properly applied to churches and that until the City applied the landmarks ordinance in a manner that impinged upon the Church's constitutional rights to operate its religious property without interference from the City, the Church's claim that the landmarks ordinance violated its rights of religious freedom was premature.

Prior to trial, the City filed a motion for summary judgment seeking dismissal of all of the Church's remaining causes of action. The trial court granted summary judgment and dismissed the Church's complaint in its entirety with prejudice.

---

[2] Under the Landmarks Preservation Ordinance, once the board designates a landmark the provisions of the landmarks ordinance requiring a Certificate of Approval for alterations or significant changes to the landmark apply to the property owner. SMC 25.12.390 (1977).

The Church appealed both summary judgment orders. The Court of Appeals certified the appeal here.

ISSUES

Two issues are presented:

> (1) Is a constitutional challenge to the Seattle Landmarks Preservation Ordinance by the Church premature until the ordinance is enforced?
>
> (2) Is the Seattle Landmarks Preservation Ordinance as applied to churches unconstitutional under the free exercise of religion provisions of the United States and Washington State Constitutions?

ANALYSIS

The issue of whether the Church's cause of action is premature requires a determination of whether there exists a justiciable controversy and whether the Church's challenge satisfies the ripeness doctrine. We find that a justiciable controversy exists and that the Church's claims are ripe for judicial determination.

The Church brought its action for declaratory judgment pursuant to the Uniform Declaratory Judgments Act, RCW 7.24.020, and applicable court rules. In order for a court to rule on a declaratory judgment, the case must present a justiciable controversy. *State ex rel. Graham v. Northshore Sch. Dist. 417*, 99 Wn.2d 232, 246, 662 P.2d 38 (1983). This court established that a justiciable controversy exists under the Act if the controversy presents:

> (1) . . . an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a

judicial determination of which will be final and conclusive.

Diversified Indus. Dev. Corp. v. Ripley, 82 Wn.2d 811, 815, 514 P.2d 137 (1973); *Spokane v. Taxpayers*, 111 Wn.2d 91, 96, 758 P.2d 480 (1988). All four elements must be satisfied or the court must dismiss the case; otherwise, the court enters into the prohibited area of advisory opinions. *Lawson v. State*, 107 Wn.2d 444, 460, 730 P.2d 1308 (1986). This case satisfies all four elements and, therefore, presents this court with a justiciable controversy.

The Church argued that the designation of the church structure as a landmark and the imposition of controls constituted substantial interference by the City with the Church's religious freedom. According to the Church, several impacts occurred immediately upon the board's designation of the church as a landmark. Those impacts included: interference with the Church's freedom to alter the exterior of the church structure; necessary secular approval of any proposed alteration of the facade requiring additional paperwork, negotiations and hearings; a limitation on the Church's ability to sell its property; and uncertainty of discretionary approval confronting the Church in its planning of any exterior change. In addition, an uncontroverted affidavit stated that landmark designation of the church resulted in a depreciation of the market value of the property from $700,000 to $400,000. Clerk's Papers, at 345-46. Affidavit of John Paul Rea.

The City contends that, absent the submission of a proposal for alteration, the Church's claim is speculative and premature. The trial court agreed and granted the City's motion for summary judgment.

The Church's challenge to the constitutionality of the landmarks ordinance as applied to church property and the designation of the church as a landmark satisfies the justiciable controversy test. The dispute involves a pres-

ent controversy between parties with opposing interests. The landmarks board designated First Covenant Church a landmark and the city council formalized that designation by passing ordinance 112425. The Church asserts that landmark designation of churches violates the constitutional guaranty of freedom of religious expression. The interests of the City and the Church are substantial and a determination by this court as to the constitutionality of the landmarks ordinance will clarify valuable property rights of churches and their freedom to practice religion. A decision here will be welcomed throughout the United States, as this is a case of first impression on this constitutional challenge.

The Church's Constitutional Challenge Is Ripe for Adjudication

In its motion for summary judgment, the City argued that the Church's cause of action was not ripe for judicial review under the ripeness doctrine established by the United States Supreme Court.[3] The Church responded that the resultant impacts of the landmark designation of the church created a present controversy ripe for judicial review.

Deciding whether a case presents a cause of action ripe for judicial determination requires an evaluation of "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Labs v. Gardner*, 387 U.S. 136, 149, 18 L. Ed. 2d 681, 87 S. Ct. 1507 (1967); *Standard Alaska Prod. Co. v. Schaible*, 874 F.2d 624, 627 (9th Cir. 1989). "A claim is fit for [judicial] decision if the issues raised are primarily legal, do not require further factual devel-

---

[3] The Supreme Court developed the ripeness doctrine in a trilogy of cases decided in 1967. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 18 L. Ed. 2d 681, 87 S. Ct. 1507 (1967); *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 18 L. Ed. 2d 697, 87 S. Ct. 1520 (1967); *Gardner v. Toilet Goods Ass'n*, 387 U.S. 167, 18 L. Ed. 2d 704, 87 S. Ct. 1526 (1967).

opment, and the challenged action is final." 874 F.2d at 627.

The Church's cause of action does not fail for lack of ripeness. The record before the court contains the factual background surrounding the designation of First Covenant Church and no additional facts need be developed to determine the constitutionality of that designation. Furthermore, the designation ordinance constitutes a final action by the Landmarks Preservation Board and the Seattle City Council. The Church unsuccessfully appealed the designation decision through numerous administrative procedures set forth in the Landmarks Preservation Ordinance. The Church has exhausted its administrative remedies and the only forum now available for appeal is the judicial system.

We hold that the Church's challenge to the Landmarks Preservation Ordinance and the designation ordinance is ripe for judicial review and that the ordinances violate the Church's constitutional right of free exercise of religion.

THE ORDINANCES CREATE AN UNCONSTITUTIONAL INFRINGEMENT UPON THE CHURCH'S RIGHT OF FREE EXERCISE OF RELIGION

The issue is whether the law should prefer religious freedom or an exercise of the police power to maintain the architectural and cultural interests associated with landmark preservation. Although First Amendment rights are not absolute, "freedom of religion [is] in a preferred position." *Murdock v. Pennsylvania*, 319 U.S. 105, 115, 319 U.S. 166, 87 L. Ed. 1292, 87 L. Ed. 2d 1330, 63 S. Ct. 870, 63 S. Ct. 882, 63 S. Ct. 891, 146 A.L.R. 81 (1943). *See also Thomas v. Review Bd. of Ind. Empl. Sec. Div.*, 450 U.S. 707, 717, 67 L. Ed. 2d 624, 101 S. Ct. 1425 (1981) (religious beliefs are protected by the Free Exercise Clause which provides special protection to the exercise of religion).

The separation between Church and State is rooted in the historical foundations of this nation. Responding to a request from the Danbury Baptist Association, President Thomas Jefferson wrote:

> "Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the government reach actions only, and not opinions,—I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion or prohibiting the free exercise thereof,' thus building a wall of separation between church and State. . . ."

Reynolds v. United States, 98 U.S. 145, 164, 25 L. Ed. 244 (1878). While recognizing instances where the compelling interests of the government outweigh its citizens' right to freely pursue their religious beliefs, the judiciary in this nation consistently prohibits unjustified governmental interference with an individual's constitutional right of free exercise of religion.

The Church contends that the Landmarks Preservation Ordinance, as applied to church property, and the designating ordinance are unconstitutional as they violate the Church's right of free exercise of religion guaranteed by the first amendment to the United States Constitution [4] and Washington's Const. art. 1, § 11 (amend. 34).[5]

---

[4] The first amendment to the United States Constitution provides in pertinent part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .".

[5] Article 1, section 11 of the Washington Constitution provides that "[a]bsolute freedom of conscience in all matters of religious . . . worship . . . shall be guaranteed to every individual". Const. art. 1, § 11 (amend. 34).

To establish a violation of free exercise, the complaining party must show "the coercive effect of the enactment as it operates against him in the practice of his religion." *School Dist. v. Schempp*, 374 U.S. 203, 223, 10 L. Ed. 2d 844, 83 S. Ct. 1560 (1963); *Witters v. Commission for the Blind*, 112 Wn.2d 363, 371, 771 P.2d 1119, *cert. denied*, —— U.S. ——, 107 L. Ed. 2d 106, 110 S. Ct. 147 (1989). If such an infringement is established, the court subjects the challenged legislation to strict scrutiny analysis requiring the governmental body to prove that (1) a compelling state interest exists to justify the regulation and (2) the regulation constitutes the least restrictive means to achieve the government's objective. *Sherbert v. Verner*, 374 U.S. 398, 10 L. Ed. 2d 965, 83 S. Ct. 1790 (1963); *Wisconsin v. Yoder*, 406 U.S. 205, 32 L. Ed. 2d 15, 92 S. Ct. 1526 (1972); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 94 L. Ed. 2d 190, 107 S. Ct. 1046 (1987).

In *Sherbert v. Verner*, the South Carolina Employment Security Commission denied unemployment benefits to a Sabbatarian who was fired for refusing to work Saturdays, the Sabbath Day of her religion. The South Carolina Unemployment Compensation Act provided "that a claimant is ineligible for benefits '[i]f . . . he has failed, without good cause . . . to accept available suitable work when offered him by the employment office or the employer . . . .'" 374 U.S. at 401. The Employment Security Commission found that the appellant's refusal to work Saturdays placed her within that provision disqualifying her for unemployment benefits. 374 U.S. at 401. The South Carolina Supreme Court affirmed, rejecting appellant's contention that the disqualifying provision in the statute violated her First Amendment right of free exercise of religion. 374 U.S. at 401. On appeal, the United States Supreme Court stated that for the decision of the South Carolina Supreme Court

> to withstand appellant's constitutional challenge, it must be either because her disqualification as a ben-

> eficiary represents no infringement by the State of her constitutional rights of free exercise, or because any incidental burden on the free exercise of appellant's religion may be justified by a "compelling state interest in the regulation of a subject within the State's constitutional power to regulate . . . ."

(Citation omitted.) 374 U.S. at 403.

Turning to the appellant's First Amendment challenge, the Court found that the disqualifying provision clearly burdened the free exercise of appellant's religion as it pressured her to forgo that practice. 374 U.S. at 403-04. Having found an infringement of the appellant's right of free exercise, the Court then subjected the statute to strict scrutiny analysis. The Court stated that

> [i]t is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, "[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation," *Thomas v. Collins*, 323 U. S. 516, 530 [89 L. Ed. 430, 65 S. Ct. 315] (1945).

374 U.S. at 406. Finding that the State did not advance such an abuse or danger, the Court reversed the State Supreme Court and remanded the case for further proceedings. 374 U.S. at 410.

Several years later, the Court affirmed the applicability of strict scrutiny analysis to governmental interference with the free exercise of religion. In *Wisconsin v. Yoder*, members of the Amish faith appealed their convictions for violating Wisconsin's compulsory school-attendance law which required children to attend school until age 16. 406 U.S. at 207.[6] The Amish asserted that

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[6] The appellees were convicted and fined $5 for their refusal to send their children to public school after they had completed the eighth grade. 406 U.S. at 207.

the statute violated their right of free exercise. They believed, in accordance with the tenets of their faith, that their children's attendance in high school was contrary to the Amish religion and way of life. 406 U.S. at 209. The Wisconsin Supreme Court found the law invalid under the Free Exercise Clause of the First Amendment and the State appealed. 406 U.S. at 207.

The United States Supreme Court applied strict scrutiny analysis to the law stating that in order for the State to overcome the free exercise challenge:

> it must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause.

406 U.S. at 214. Finding that the State's interest in compulsory education did not outweigh the appellees' right of free exercise of religion, the court concluded

> [t]he essence of all that has been said and written on the subject is that only those interests of the highest order, and those not otherwise served can overbalance legitimate claims to the free exercise of religion.

406 U.S. at 215. *Cf. Thomas v. Review Bd. of Ind. Empl. Sec. Div.*, 450 U.S. 707, 718, 67 L. Ed. 2d 624, 101 S. Ct. 1425 (1981) (State's denial of unemployment benefits to Jehovah's Witness who refused transfer to munitions division on religious grounds unconstitutionally burdened his right to free exercise of religion; "The state may justify in inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest.").

Recently, the Court appeared to step back from the strict scrutiny standard advancing instead a less rigorous standard of review for free exercise challenges. In *Bowen v. Roy*, 476 U.S. 693, 90 L. Ed. 2d 735, 106 S. Ct. 2147

(1986), the Court addressed a First Amendment challenge to a federal statutory requirement that participants in certain welfare programs must provide state welfare agencies administering the program with their social security number and those of each member of their household as a condition of receiving benefits. 476 U.S. at 695. The appellees contended that obtaining a social security number for their daughter would violate their Native American religious beliefs. 476 U.S. at 695. Rejecting the contention that the statutory requirement violated appellees' right of free exercise, Chief Justice Burger analyzed the statute under a lower standard of review. The Chief Justice stated that "the Government meets its burden when it demonstrates that a challenged requirement for governmental benefits, neutral and uniform in its application, is a reasonable means of promoting a legitimate public interest." 476 U.S. at 707-08. However, only Justices Powell and Rehnquist concurred in that portion of the majority opinion.

One year later, the Court decisively rejected Chief Justice Burger's less rigorous standard. In *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 94 L. Ed. 2d 190, 107 S. Ct. 1046 (1987), once again the Court reviewed the denial of unemployment benefits to an individual terminated from employment for her refusal to work on her Sabbath Day. Responding to the claim that its denial of benefits violated appellant's right of free exercise, the Unemployment Appeals Commission argued that the Court should apply the standard of review set forth in *Roy*. Justice Brennan, writing for a 6-Justice majority, stated that five Justices rejected the argument in *Roy* and that "[w]e reject the argument again today." 480 U.S. at 141. Setting forth the applicable standard of review, the Court stated that "[b]oth *Sherbert* and *Thomas* held that such infringements must be subjected to strict scrutiny and could be justified only by proof by the State of a compelling interest." 480 U.S. at 141. Applying strict scrutiny analysis, the Court held that

Florida's denial of unemployment benefits to appellant violated the Free Exercise Clause of the First Amendment. 480 U.S. at 146.[7]

The ordinances at issue require the Church to seek secular approval of any proposed change to the church's facade requiring a building permit. SMC 25.12.670 (1977); Seattle city ordinance 112425 (1985) app. B, at 226. The landmarks ordinance requires that once the landmarks board files an approval of a nomination of a landmark, the landmark owner must obtain a Certificate of Approval from the board before the owner may make alterations or significant changes to the designated features or characteristics of the landmark or make significant changes or alterations which would violate any control imposed by the designating ordinance. SMC 25.12.670 (1977).[8] A control set forth in the designating ordinance specifically requires the Church to obtain a

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[7] As recently as the last term, the Court employed strict scrutiny analysis to a government regulation challenged as violative of the Free Exercise Clause. In *Hernandez v. Commissioner*, —— U.S. ——, 104 L. Ed. 2d 766, 786, 109 S. Ct. 2136, 2148 (1989), the Court stated that "[t]he free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden."

[8] Section 25.12.670 of the Seattle Landmarks Preservation Ordinance sets forth the requirement of the Certificate of Approval:

"After the filing of an approval of nomination with the Superintendent and thereafter as long as proceedings for a designation are pending or a designating ordinance so requires, a certificate of approval must be obtained, or the time for denying a certificate of aproval must have expired, before the owner may:

"A. Make alterations or significant changes to specific features or characteristics of the site, improvement or object suggested for preservation in the approval of nomination, or thereafter specified in the report on approval of designation of the decision of the Hearing Examiner, whichever was issued most recently, while proceedings under this chapter are pending; or

"B. Make alterations or significant changes which would be in violation of specific controls imposed by a designating ordinance."

Certificate of Approval for any alteration to the exterior of the church structure requiring a building permit. *See* section 2 of Seattle city ordinance 112425 (1985) app. B, at 226. The practical effect of the provisions is to require a religious organization to seek secular approval of matters potentially affecting the Church's practice of its religion.

The City claims that the designating ordinance's exemption for changes based upon liturgy precludes any interference by the City with the Church's practice of religion. The designating ordinance provides:

> Section 2. The following controls upon alteration of the landmark are hereby imposed:
>
> > A Certificate of Approval must be obtained or the time for denying a Certificate of Approval must have expired before the owner may make any alteration which requires a building permit, to any portion of the exterior of the building; Provided, that all in kind maintenance and repair of the exterior and any alterations which do not require a building permit shall be excluded from the Certificate of Approval requirements; and Provided further that *nothing herein shall prevent any alteration of the exterior when such alterations are necessitated by changes in liturgy*, it being understood that the owner is the exclusive authority on liturgy and is the decisive party in determining what architectural changes are appropriate to the liturgy. *When alterations necessitated by changes in liturgy are proposed, the owner shall advise the Landmarks Preservation Board in writing of the nature of the proposed alterations and, the Board shall issue a Certificate of Approval. Prior to the issuance of any Certificate, however, the Board and owner shall jointly explore such possible alternative design solutions as may be appropriate or neces-*

sary to preserve the designated features of the landmark.

(Italics ours.) Seattle city ordinance 112425 (1985). We find that the liturgy exception does not mitigate the City's infringement upon the Church's right of free exercise. The liturgy exception establishes a vague standard which does not withstand close scrutiny.

The designating ordinance contains no definition of "liturgy". Absent a contrary definition provided in the ordinance, words of an ordinance are to be given their usual and ordinary meaning. *Dominick v. Christensen*, 87 Wn.2d 25, 27, 548 P.2d 541 (1976). *Webster's Third New International Dictionary* (1971) at page 1323 defines liturgy as "a rite or series of rites, observances, or procedures prescribed for public worship in the Christian church in accordance with authorized or standard form". According to that definition, liturgy essentially refers to the religious activity occurring within a church as part of the religious ritual. It provides a vague criterion for the Church to rely upon when planning alterations to the church exterior. Would a wider door to permit access by handicapped parishioners comprise a liturgical change? Although the widening of the door does not relate directly to the rites or procedures of worship in the church, it does facilitate the ability of disabled persons to participate in religious services and activities. The anomalies created by the liturgy exception are cumbersome and would result in numerous delays in carrying out routine church work. We find that the liturgy exception constitutes a vague and unworkable criterion that fails to accommodate the constitutional rights of the Church and infringes on the Church membership's ability to freely practice its religion.

Even if the liturgy exception represented an appropriate criterion, the requirements of the designating ordinance still violate the Church's right of free exercise. The controls placed upon the Church require that if the Church proposes a change based upon liturgy, prior to

the issuance of a Certificate of Approval "the Board and owner shall jointly explore such possible alternative design solutions as may be appropriate or necessary to preserve the designated features of the landmark." Seattle city ordinance 112425 (1985) app. B, at 226. Regardless of the religious nature of the proposed alteration, the Church must submit its plans to the board, a secular body, and negotiate possible alternatives. That requirement creates unjustified governmental interference in religious matters of the Church and thereby creates an infringement on the Church's constitutional right of free exercise. Furthermore, the parallel provisions of the landmarks ordinance requiring a landmark owner to obtain a Certificate of Approval prior to making structural changes to the landmark also infringe upon the Church's religious freedom.

A substantial infringement of a First Amendment right can be justified only by proof of a compelling governmental interest. *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 141, 94 L. Ed. 2d 190, 197-98, 107 S. Ct. 1046, 1049 (1987); *Sherbert v. Verner*, 374 U.S. 398, 403, 10 L. Ed. 2d 965, 83 S. Ct. 1790 (1963). Landmark preservation laws constitute a use of police power to maintain the aesthetic and cultural features of a community. Such ordinances do not represent efforts by the government to further its interest in the health and safety of its citizens. The United States Supreme Court found that landmark preservation represented an important state interest but did not express the view that it constituted a compelling interest. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978).

In *Penn-Central*, the Supreme Court addressed the validity of the application of New York City's Landmarks Preservation Law to a commercial building. The owners of Grand Central Terminal intended to construct a high-rise office building above the terminal. 438 U.S. at 116-17. The New York City Landmarks Preservation Commis-

sion previously designated the terminal a historical landmark and refused to grant approval of the owners' building plans. The owners filed suit alleging, *inter alia*, that the application of the landmarks law constituted a taking without just compensation and deprived the owners of their property without due process. 438 U.S. at 119. Initially, the Court acknowledged the public interest in preserving historical landmarks. 438 U.S. at 107. Turning to the taking issue, the Court stated that the rational relation standard used in challenges to zoning laws applied as well to challenges to landmark designations. 438 U.S. at 133 n.29. Rejecting appellants' claims, the Court held that based upon the present record "[t]he restrictions imposed are substantially related to the promotion of the general welfare . . .". 438 U.S. at 138.

The appellants did not allege any violation of a fundamental right. Absent such a claim, the Court was able to employ minimal scrutiny in its analysis of New York City's Landmarks Preservation Law. Although the Court held that the landmarks law satisfied the limited inquiry of minimal scrutiny, it seems most likely the Court would not have reached the same result had it analyzed the law under strict scrutiny.

We hold that the preservation of historical landmarks is not a compelling state interest. Balancing the right of free exercise with the aesthetic and community values associated with landmark preservation, we find that the latter is clearly outweighed by the constitutional protection of free exercise of religion and the public benefits associated with the practice of religious worship within the community. *See Church of St. Paul & St. Andrew v. Barwick*, 67 N.Y.2d 510, 525, 496 N.E.2d 183, 505 N.Y.S. 2d 24 (Meyer, J., dissenting), *cert. denied*, 479 U.S. 985 (1986).

CONCLUSION

We hold that the Seattle Landmarks Preservation Ordinance 106348 and Seattle ordinance 112425 designating First Covenant Church a landmark violate the Church's First Amendment rights under the United States Constitution and Washington's Const. art. 1, § 11 (amend. 34).

We reverse the City's summary judgment and grant summary judgment of dismissal to the Church.

CALLOW, C.J., UTTER, and DURHAM, JJ., and PEARSON, J. Pro Tem., concur.

UTTER, J. (concurring)—I agree with the majority's conclusion that this declaratory judgment action is ripe for decision and that the landmark preservation ordinance cannot be applied to the First Covenant Church. I write separately to emphasize the facts which require this decision in this case and to indicate the legal standards which should govern such cases in the future.

I

As the majority points out, the landmark designation has reduced the value of the church's property, its most valuable asset. Since the landmark designation is complete and has had an impact on the church, consideration of this case is not premature.

The dissent argues correctly that we should dispose of the question of whether state regulation of the church's building modifications violates the church's free exercise rights by adopting the defendant's interpretation of the ordinance. This would make any changes to the church's structure for religious purposes exempt from the ordinance's review procedures.

In order to do that, however, we have to reach the issue. Because the case presents a ripe justiciable controversy, we should reach this issue.

The dissent cites two cases to support its view that this case is neither ripe nor justiciable. See dissenting opinion, at 418. In both these cases the court found that the matter before it was justiciable. *See Spokane v. Taxpayers*, 111 Wn.2d 91, 96, 758 P.2d 480 (1988) (controversy justiciable); *Abbot Labs. v. Gardner*, 387 U.S. 136, 18 L. Ed. 2d 681, 87 S. Ct. 1507 (1967) (controversy ripe). Therefore, the dissent's reliance on these cases is misplaced.

A justiciable controversy requires (1) an existing dispute; (2) parties having genuine opposing interests; (3) direct and substantial interests at stake; and (4) a controversy amenable to conclusive judicial resolution. *Spokane*, 111 Wn.2d at 96. This case involves an existing dispute about whether this specific church may be designated a landmark. The State has an interest in preserving First Covenant and the church has an interest in operating it without state interference and without diminution in value. The judiciary can conclusively decide this case, as the dissent has demonstrated, with respect to the liturgy exemption.

The dissent complicates the inquiry into justiciability greatly by introducing the concept of ripeness as articulated by the United States Supreme Court in *Abbott Labs. v. Gardner*, *supra* at 148-49. None of our prior cases have cited *Gardner* or approved of its charaterization of the ripeness doctrine.

More importantly, *Gardner* supports finding that this case is ripe. *Gardner* involved a preenforcement challenge to Food and Drug Administration regulations. *Gardner*, 387 U.S. at 138-39. The *Gardner* Court held that the challenge was ripe and remanded to the Court of Appeals for the Third Circuit for a ruling on the merits. 387 U.S. at 156. Although the government had not yet enforced the regulations against the drug companies, the Court held that the impact of the regulations

"is sufficiently direct and immediate as to render the issue appropriate for judicial review at this stage." *Gardner*, 387 U.S. at 152. The Court noted that the purpose of the declaratory judgment act required judicial review. *See Gardner*, 387 U.S. at 152. Similarly, the church has been designated a landmark; like the drug companies, it must obey the challenged law if constitutional. It need not await the application of each individual restriction of the act before challenging its constitutionality. It has a right to the declaratory judgment it seeks.

Washington precedent on ripeness in land-use cases does not allow us to delay a decision just because the litigant has not suffered enough injury to satisfy the court. In our previous cases we have decided whether claims were ripe on the basis of whether the administrative action was final, not on the intensity of the litigant's complaint. *See Estate of Friedman v. Pierce Cy.*, 112 Wn.2d 68, 768 P.2d 462 (1989) (holding that a litigant's taking claim was not ripe because of a failure to exhaust administrative remedies); *Orion Corp. v. State*, 109 Wn.2d 621, 747 P.2d 1062 (1987) (litigant's taking claim ripe because further administrative appeals would be futile), *cert. denied*, 486 U.S. 1022 (1988); *Department of Ecology v. Kirkland*, 84 Wn.2d 25, 523 P.2d 1181 (1974) (issue ripe for review because administrative action was final). It seems that the dissent has confused the issue of ripeness with the question of whether the church's claim is meritorious.

II

The majority's conclusion that application of this ordinance to this church constitutes a free exercise violation is correct because the church has shown that application of the ordinance to it greatly diminishes the value of its principal asset. As the dissent states, adopting the City's construction of its own ordinance will avoid the necessity of deciding the question of whether state approval

of the church's modification of its building violates the First Amendment. But the issue of whether the ordinance violates the constitution because of its impact on church finances requires a constitutional decision.

Prior to the United States Supreme Court's decision in *Jimmy Swaggart Ministries v. Board of Equalization*, —— U.S. ——, 107 L. Ed. 2d 796, 110 S. Ct. 688 (1990),, Supreme Court precedent seemed to prohibit the imposition of a financial burden on the practice of religion. The Supreme Court had struck down a license tax on Jehovah's Witnesses and a tax on the sale of religious materials because these taxes burdened the free exercise of religion. *See Murdock v. Pennsylvania*, 319 U.S. 105, 319 U.S. 166, 87 L. Ed. 1292, 87 L. Ed. 1330, 63 S. Ct. 870, 63 S. Ct. 882, 63 S. Ct. 891, 146 A.L.R. 81 (1943); *Follett v. McCormick*, 321 U.S. 573, 88 L. Ed. 938, 64 S. Ct. 717 (1944). Because of this it appeared that a land use restriction imposed specifically on a church causing gross diminution in the value of its principal asset might violate the free exercise clause.[9]

The Supreme Court's decision in *Swaggart*, handed down after this case was argued, shows that a financial burden does not constitute a per se free exercise violation. The Court upheld the application of a tax on the distribution of literature to the sales operations of the Swaggart ministry. It distinguished *Murdock* and *Follett*

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[9] The comments of Justices Scalia, Rehnquist and Kennedy in their dissent in *Texas Monthly, Inc. v. Bullock*, —— U.S. ——, 103 L. Ed. 2d 1, 109 S. Ct. 890 (1989) demonstrate this. The *Texas Monthly* Court invalidated a tax exemption for sales of religious periodicals as violating the establishment clause of the First Amendment. *Texas Monthly*, 109 S. Ct. at 894. The dissenters noted that *Murdock* and *Follett* might require a tax exemption for religious periodicals lest a free exercise violation occur. *Texas Monthly*, at 908. The same logic would require an exemption for land use controls upon churches which create a financial burden.

on the grounds that the taxes struck down in those cases constituted prior restraints on religious activities.[10]

It went on to limit its decision by leaving open the argument that a more onerous tax imposed upon a church could interfere with religious activity and constitute a free exercise violation. It had to leave this argument open because in *Murdock* the Court had indicated that the sheer weight of a flat tax could unconstitutionally crush evangelicalism. *Murdock*, 319 U.S. at 115.

Our precedent and the precedent of the New York Court of Appeals provides useful guidance to the proper evaluation of the effects of financial burdens imposed by land-use restrictions on the free exercise of religion. This topic necessarily requires development by state courts because the United States Supreme Court has never decided a land-use case involving a church's free exercise claim.[11] Indeed, until recently the Court had decided few cases involving burdens upon churches as institutions as opposed to burdens on individuals. *See Sumner v. First Baptist Church*, 97 Wn.2d 1, 16-17, 639 P.2d 1358 (1982) (Dolliver, J., dissenting) (describing the inapplicability of Supreme Court precedents cited by the majority).

In *Sumner v. First Baptist Church, supra*, this court held that the application of a building code ordinance to

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[10] One of the decisions in *Texas Monthly, Inc. v. Bullock, supra*, anticipated this development. Justices Brennan, Marshall, and Stevens limited *Murdock* in much the same way as the *Swaggart* decision. *Texas Monthly*, 109 S. Ct. at 893. But their views on that point did not command a majority until the *Swaggart* decision.

[11] The Court's decision in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 99 L. Ed. 2d 534, 108 S. Ct. 1319 (1988) did not involve a church. In that case, the Supreme Court overturned a Ninth Circuit ruling forbidding upgrading a road and allowing a timber harvest which would interfere with Indian rituals linked to the land. The Court held that the free exercise clause does not restrain the government's use of government-owned land. It is thus of no use in deciding the case at bar.

a church school presented a free exercise claim. The plurality stated that the practical effect of uncompromising application of the building code would be to close down the church operated school. *Sumner*, 97 Wn.2d at 7. The dissent pointed out that it might not have this effect; instead, the defendant might choose to come up to code. *Sumner*, at 20. The court remanded the case to see if the church's needs might be accommodated with the need for safety. *Sumner*, at 8-10.

Sumner supports the proposition, implicit in *Murdock* and *Follett*, that regulations imposing financial burdens on churches can create a free exercise claim. Because the burden created in this case is so much greater than the burden imposed in *Sumner*, we must sustain the church's challenge in this case.

Land-use restrictions interfere with religious practice, not religious belief. *See* Comment, *Zoning Ordinances Affecting Churches: A Proposal for Expanded Free Exercise Protection*, 132 U. Pa. L. Rev. 1131, 1149 (1984). But religion is to some extent a communal matter. Ritual in some religions is inseparable from the spiritual experience of faith. An assembly of adherents is essential to creation of a unified community with a shared spiritual life. *See* Comment, at 1149-50. The free exercise clause protects religious practice as well as belief.

For these reasons, the law protects a church's ability to function as an institution. To some extent, it necessarily protects a church's finances. As the Supreme Court said in *Murdock*, "It is plain that a religious organization needs funds to remain a going concern." *Murdock*, 319 U.S. at 111. If a land-use restriction interferes markedly with a church's ability to perform its mission, the restriction may have to yield. *See Sumner* (land use regulation must allow church school to function at its present location); *State ex rel. Wenatchee Congregation of Jehovah's Witnesses v. Wenatchee*, 50 Wn.2d 378, 312

P.2d 195 (1957) (requiring special use permit for a church zoned out of a residential area); 82 Am. Jur. 2d *Zoning and Planning* § 154 (1976) (showing that most states have held zoning ordinances severely restricting church construction unconstitutional).

Although I think that our decision in *Sumner* compels us to rule in First Covenant's favor in the instant case, I write separately to urge that we apply a different approach in future cases. In light of *Swaggart*, we ought to require a very specific showing of hardship to justify exemption from land use restrictions in the future.

New York's courts require that landmark designation not prevent or seriously interfere with the carrying out of a chuch's religious and charitable purposes. *See Lutheran Church in Am. v. New York*, 35 N.Y.2d 121, 131, 316 N.E.2d 305, 359 N.Y.S.2d 7 (1974); *Church of St. Paul & St. Andrew v. Barwick*, 67 N.Y.2d 510, 530, 496 N.E.2d 183, 505 N.Y.S.2d 24 (Mayer, J., dissenting), *cert. denied*, 479 U.S. 985 (1986).

We should adopt the New York test as the means of evaluating free exercise claims in land use. While imposition of a financial burden does not per se create a free exercise problem, the free exercise clause does not allow the state to impose financial burdens throttling religious practice. *See Swaggart*, 107 L. Ed. 2d at 811; *Murdock*, 319 U.S. at 111, 115.

The New York cases have not outlawed the application of land-use restrictions to churches. Instead, the cases permit relief from the strictures of ordinances when they genuinely interfere with a church's ability to perform its mission. For example, in *Westchester Reform Temple v. Brown*, 22 N.Y.2d 488, 239 N.E.2d 891, 293 N.Y.S.2d 297 (1968), the New York Court of Appeals required the zoning authorities to modify a setback requirement interfering with a needed expansion of a synagogue. The court relied heavily on the "undisputed fact . . . that the present facilities must be expanded to meet the increas-

ing needs of the congregation." *Westchester*, at 492. It rested its opinion on First Amendment grounds. *See also Jewish Reconstructionist Synagogue v. Roslyn Harbor*, 38 N.Y.2d 283, 342 N.E.2d 534, 379 N.Y.S.2d 747 (1975), *cert. denied*, 426 U.S. 950 (1976) (requiring special use permit for synagogue in residential area).

On the other hand, the New York Court of Appeals rejected the argument that a decline in market value alone constituted a free exercise violation in *Society for Ethical Culture v. Spatt*, 51 N.Y.2d 449, 456, 415 N.E.2d 922, 434 N.Y.S.2d 932 (1980) ("there simply is no constitutional requirement that a landowner always be allowed his property's most beneficial use"). Nevertheless, a landmark ordinance cannot be applied to prohibit a church from realizing sufficient profits to move or replace its building if it becomes unsuitable to its needs. *See Lutheran Church in Am. v. New York*, 35 N.Y.2d at 132 (prohibiting landmark designation when church wished to demolish outmoded building and obtain a new one).

Our decision in *Sumner* and the uncontested gross diminution of the value of its property justify the majority's decision in this case. In light of *Swaggart*, we should apply the New York approach to future cases.

DURHAM, J., and PEARSON, J. Pro Tem., concur with UTTER, J.

DOLLIVER, J. (dissenting)—The issue before the court is whether the Seattle landmarks preservation ordinance 106348 (Seattle Municipal Code 25.12), under the authority of which the church building owned by and housing the plaintiff has been declared a landmark (*see* Seattle ordinance 112425), unconstitutionally impinges upon plaintiff's right to its free exercise of religion. U.S. Const. amend. 1; *see also* Const. art. 1, § 11 (amend. 34). I would hold that it does not.

In contrast to the extended analysis of the majority, I believe the case can be decided easily and summarily.

Particularly in cases of this nature the court should render a decision only on those issues necessary to decide the case.

The pertinent language of the ordinance designating the First Covenant Church building as a landmark (Seattle ordinance 112425) is as follows:

> [N]othing herein shall prevent any alteration of the exterior when such alterations are necessitated by *changes in liturgy*, it being understood that the owner is the exclusive authority on liturgy and is the decisive party in determining what architectural changes are appropriate to the liturgy. When alterations necessitated by changes in liturgy are proposed, the owner shall advise the Landmarks Preservation Board in writing of the nature of the proposed alterations and, the Board shall issue a Certificate of Approval. Prior to the issuance of any Certificate, however, the Board and owner shall jointly explore such possible alternative design solutions as may be appropriate or necessary to preserve the designated features of the landmark.

(Italics mine.)

In its motion for summary judgment, defendant stated:

> Any changes that First Covenant chooses to make to the exterior of the structure *for religious purposes* are exempted from the normal landmarks review and approval requirement. As written, therefore, the imposed controls cannot interfere with First Covenant's free exercise of religion.

(Italics mine.)

By this statement, which is surely in the interest of the plaintiff, the City has given its interpretation of the term "liturgical exception" in the ordinance designating the First Covenant Church as a landmark. Thus, all this court need do is confirm the interpretation of the City, and the City will be bound to that position. If this is done, the ordinance on its face would not threaten the

use made of the building by the congregation or changes made in the exterior of the building so long as any uses or changes are for religious purposes. Since this, as I understand it, is the real concern of the plaintiff, if this approach were adopted, the case of the plaintiff would collapse.

As to other questions which plaintiff may have as to the validity of the ordinance, there is neither a justiciable controversy (*Spokane v. Taxpayers*, 111 Wn.2d 91, 758 P.2d 480 (1988)) nor is the matter ripe for litigation (*Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49, 18 L. Ed. 2d 681, 87 S. Ct. 1507 (1967)). Finally, to suggest that the requirement the church and landmarks board "shall jointly explore such possible alternative design solutions as may be appropriate or necessary to preserve the designated features of the landmark" (majority, at 408) is an excessive burden on the "free exercise of religion" is to trivialize the great protections of the First Amendment.

I would affirm the trial court. This court should by its opinion confirm the interpretation by the City of Seattle landmarks preservation ordinance 106348 and hold the ordinance does not apply to any changes made to the First Covenant Church for "religious purposes". The discussion of other issues raised by the landmarks preservation ordinance, including the effect of a decision by plaintiff to use or sell its property for "nonreligious purposes", should wait until another day.

BRACHTENBACH and SMITH, JJ., and BAKER, J. Pro Tem., concur with DOLLIVER, J.

THE SUPREME COURT OF WASHINGTON

No. 56377-2

FIRST COVENANT CHURCH OF SEATTLE WASHINGTON,
a non-profit corporation,
Appellant,

v.

THE CITY OF SEATTLE,
a Washington municipal corporation,
Respondent.

RULING ACCEPTING CERTIFICATION

[Filed Aug. 16, 1989]

By order dated August 7, 1989, this appeal was certified to this court by Division One of the Court of Appeals pursuant to RCW 2.06.030. Having reviewed the Court of Appeals file, I agree that the case warrants direct review under the cited statute. Certification is therefore accepted. Court of Appeals Cause No. 23217-7-I, in its entirety, is hereby transferred to this court for determination on the merits.

Dated at Olympia, Washington, August 16, 1989.

/s/ [Illegible]
Deputy Commissioner

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

No. 23217-7-I

FIRST COVENANT CHURCH OF SEATTLE WASHINGTON,
a non-profit corporation,
Appellant,

v.

THE CITY OF SEATTLE,
a Washington municipal corporation,
Respondent.

ORDER OF CERTIFICATION

[Filed Aug. 7, 1989]

A panel of the court has reviewed this case prior to argument and determined that it involves an issue of broad public import which requires prompt and ultimate determination, to wit:

> Is the Seattle Landmarks Preservation Ordinance unconstitutional under the First and Fourteenth Amendments?
>
> Is a constitutional challenge to the Seattle Landmarks Preservation Ordinance by a church premature until the ordinance is enforced?

This case having met the criteria of RCW 2.06.030(d); now, therefore, it is hereby

ORDERED that the above-entitled case is certified to the Supreme Court for such determination as that court deems appropriate.

Done this 7 day of August, 1989.

/s/ Coleman, C.J.

/s/ Webster, J.

/s/ [Illegible]

IN THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
FOR KING COUNTY

No. 86-2-01179-0

FIRST COVENANT CHURCH,
Plaintiff,

vs.

THE CITY OF SEATTLE,
Defendant.

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

THIS MATTER came on for hearing before the undersigned judge of the above-entitled court on the motions of plaintiff and defendant for summary judgment. Plaintiff was represented by their attorneys, A. T. Wendells and Gordon S. Clinton. Defendant was represented by its attorneys, Douglas N. Jewett, City Attorney, and James E. Fearn, Jr., Assistant.

Prior to making its decision, the court heard argument of counsel and considered the records and files herein including but not limited to all pleadings in this cause, the Affidavit of A. T. Wendells and the Affidavit of Karen Gordon in support of the Motions for Summary Judgment, and the authorities cited by Plaintiff and Defendant in their respective Memoranda.

Based upon the materials reviewed, and the argument of counsel, the court does hereby find that there are no material disputed factual isues and does further

ADJUDGE and DECREE that:

(1) Until, and unless the City denies Plaintiff's request for approval to alter or demolish the desig-

nated landmark, or otherwise develop its property, declaratory relief is inapprropriate to determine whether the ordinance imposing landmark controls on the property (No. 112425) is void for vagueness or effects a taking without just compensation;

(2) The criteria in the City's Landmarks Ordinance (No. 106348) is not void for vagueness;

(3) The plaintiff was not denied equal protection under the state or federal constitutions because the City did not provide economic incentives in the ordinance imposing landmark controls on plaintiff's property; and

(4) Declaratory relief is not the proper remedy for seeking judicial review of municipal land use decisions.

The court, therefore, Orders that defendant's Motion for Summary Judgment is granted, and plaintiff's complaint is hereby dismissed with prejudice and costs.

DONE IN OPEN COURT this 27th day of October, 1988.

/s/ Herbert J. Stevens
Judge

Presented by:

DOUGLAS N. JEWETT
City Attorney

By /s/ James E. Fearn, Jr.
JAMES E. FEARN, JR.
Assistant City Attorney

Attorneys for Defendant
Approved for Entry:

/s/ A. T. Wendells
A. T. WENDELLS
Attorney for Plaintiff

IN THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
FOR KING COUNTY

No. 86-2-01179-0

FIRST COVENANT CHURCH,
Plaintiff,

vs.

THE CITY OF SEATTLE,
Defendant.

FINDINGS OF UNDISPUTED FACTS AND ORDER DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND GRANTING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

THIS MATTER came on for hearing on the defendant's motions dated August 25 and September 15, 1986 for a declaratory summary judgment.

The plaintiff urges that the designation of the First Covenant Church by the City of Seattle (Ordinance No. 11245, September 24, 1985) as a landmark and subject to the requirements and regulations of Seattle Landmarks Preservation Ordinance No. 1-06348 is unconstitutional and void because (1) the Seattle Landmarks Preservation Ordinance was not intended to apply to churches and (b) that application of the Landmark's Preservation Ordinance to any active church constitutes an interference with the free exercise of religion contrary to the First Amendment of the United States Constitution and Article 1, Section 11 of the Washington Constitution.

Based upon the records and files in these proceedings and the submissions of parties and the statements of counsel the court finds the following:

UNDISPUTED FACTS

1. The plaintiff presently uses the property which is the subject matter of these proceedings and which was declared to be a landmark which is subject to the city's Landmark Preservation Ordinance exclusively for religious purposes.

2. The plaintiff presently has no plans or proposals for additions or modifications to the structure.

3. The plaintiff church was duly designated, over objections of the plaintiff and in the course of procedures for adoption of Seattle Ordinance No. 112425 as a landmark.

4. The underlying ordinance, the city's Landmark Preservation Ordinance (Ordinance No. 106345 and the subsequent ordinance declaring the plaintiff church to be a "landmark" were duly enacted by the City Council.

On the basis of the undisputed facts and giving due consideration to the texts of the ordinances which are now part of the record of these proceedings and upon due consideration of the arguments of counsel and the written memorandum submitted by counsel in support of the respective positions of the parties the court concludes as follows:

1. Although the governing ordinances do not single out "churches" by name, reasonable construction of the ordinance leads to the conclusion that church buildings are reasonably subject to the requirements of the Landmark Preservation Ordinance. The ordinance is clearly directed towards all buildings and structures more than twenty five years old. The fact that the ordinance provides for "economic incentives" as consideration for im-

position of controls on a designated landmark site or landmark does not establish that the ordinance was not intended to apply to churches. Section 10.03.(9) defining economic incentives as ". . . such compensation, rights, privileges or combinations thereof which the council may be authorized to grant . . ." as consideration for imposition of controls . . ." does not necessarily rule out the possibility of compensation for loss of property value, if any, which may or may not result as a function of classification as a "landmark." In all other respects the ordinance is broad and comprehensive and consistent with the conclusion that structures of the kind owned by the plaintiff were intended to be and are subject to the Landmark Preservation Ordinance.

2. Unless and until the city undertakes to apply the ordinance in a manner that in some way impinges upon the undoubted constitutional right of the plaintiff to operate its religious property without interference from the city, the question of whether or not the effect of the ordinances in question constitute an interference with the plaintiff's rights of religious freedom under the First Amendment of the United States Constitution and Article 1, Section 11 of the Washington Constitution is premature.

The mere fact that the ordinance might possibly be construed as requiring the plaintiff to submit plans for remodeling does not necessarily force the conclusion that the city's actions in the future will impinge on these constitutional rights of religious freedom. Whether any future action by the city with respect to any future hypothetical decision of the plaintiff church impinges upon a constitutional right, under the First Amendment or of the Federal Constitution or Article 1, Section 11 of the Washington Constitution,, must necessarily depend upon the facts and circumstances presented at that time.

The plaintiff takes great pains to emphasize that this is not a zoning case and that even if the city has some

police power with respect to public safety and building code authorizations under other ordinances, the very existence of the Landmark Preservation Ordinance may subject the church to certain procedural requirements in the future. This is also too abstract and premature to justify a judicial decision prior to the time that all necessary facts have been developed which could well affect the outcome.

The plaintiff has contended that the passage of the ordinance of designation itself, establishing controls, constitutes an unconstitutional interference with its religious freedom. This court rejects that contention.

On the basis of the foregoing Findings of Fact and Conclusions of Law it is hereby ORDERED, JUDGED AND DECREED:

That the plaintiff's motion for summary judgment on the foregoing grounds is hereby denied and defendant's motion is granted without prejudice to the plaintiff's remaining contentions of fact and law.

DATED this 1 day of October, 1987.

/s/ John W. Riley
JOHN W. RILEY
Judge

Presented by:

DOUGLAS N. JEWETT
City Attorney

By /s/ James E. Fearn, Jr.
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IN THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
FOR KING COUNTY

No. 86-2-01179-0

FIRST COVENANT CHURCH,
Plaintiff,
vs.
THE CITY OF SEATTLE,
Defendant.

FINDINGS OF UNDISPUTED FACTS AND ORDER DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

This matter came on for hearing on the plaintiff's motion dated August 25, 1986 for the declaratory summary judgment.

The plaintiff urges that the designation of the First Covenant Church by the City of Seattle (Ordinance No. 11245, September 24, 1985) as a landmark and subject to the requirements and regulations of Seattle Landmarks Preservation Ordinance No. 1-06348 is unconstitutional and void because (1) the Seattle Landmarks Preservation Ordinance was not intended to apply to churches and (b) that application of the Landmark's Preservation Ordinance to any active church constitutes an interference with the free exercise of religion contrary to the First Amendment of the United States Constitution and Article 1, Section 11 of the Washington Constitution.

Based upon the records and files in these proceedings and the submissions of parties and the statements of counsel the court finds the following:

UNDISPUTED FACTS

1. The plaintiff presently uses the property which is the subject matter of these proceedings and which was declared to be a landmark which is subject to the city's Landmark Preservation Ordinance exclusively for religious purposes.

2. The plaintiff presently has no plans or proposals for additions or modifications to the structure.

3. The plaintiff church was duly designated, over objections of the plaintiff and in the course of procedures for adoption of Seattle Ordinance No. 112425 as a landmark.

4. The underlying ordinance, the city's Landmark Preservation Ordinance (Ordinance No. 106345) and the subsequent ordinance declaring the plaintiff church to be a "landmark" were duly enacted by the City Council.

On the basis of the undisputed facts and giving due consideration to the texts of the ordinances which are now part of the record of these proceedings and upon due consideration of the arguments of counsel and the written memorandum submitted by counsel in support of the respective positions of the parties the court concludes as follows:

1. Although the governing ordinances do not single out "churches" by name, reasonable construction of the ordinance leads to the conclusion that church buildings are reasonably subject to the requirements of the Landmark Preservation Ordinance. The ordinance is clearly directed towards all buildings and structures more than twenty-five years old. The fact that the ordinance provides for "economic incentives" as consideration for imposition of controls on a designated landmark site or landmark does not establish that the ordinance was not intended to apply to churches. Section 1.03.(9) defining economic incentives as ". . . such compensation, rights, privileges or

combinations thereof which the council may be authorized to grant . . ." as consideration for imposition of controls . . ." does not necessarily rule out the possiblity of compensation for loss of property value, if any, which may or may not result as a function of classification as a "landmark." In all other respects the ordinance is broad and comprehensive and consistent with the conclusion that structures of the kind owned by the plaintiff were intended to be and are subject to the Landmark Preservation Ordinance.

2. Unless and until the city undertakes to apply the ordinance in a manner that in some way impinges upon the undoubted constitutional right of the plaintiff to operate its religious property without interference from the city, the question of whether or not the effect of the ordinances in question constitute and interference with the plaintiff's rights of religious freedom under the First Amendment of the United States Constitution and Article 1, Section 11 of the Washington Constitution is premature.

The mere fact that the ordinance might possibly be construed as requiring the plaintiff to submit plans for remodeling does not necessarily force the conclusion that the city's actions in the future will impinge on these constitutional rights of religious freedom. Whether any future action by the city with respect to any future hypothetical decision of the plaintiff church impinges upon a constitutional right, under the First Amendment or of the Federal Constitution or Article 1, Section 11 of the Washington Constitution, must necessarily depend upon the facts and circumstances presented at that time.

The plaintiff takes great pains to emphasize that this is not a zoning case and that even if the city has some police power with respect to public safety and building code authorizations under other ordinances, the very existence of the Landmark Preservation Ordinance may

subject the church to certain procedural requirements in the future. This is also too abstract and premature to justify a judicial decision prior to the time that all neces-sary facts have been developed which could well affect the outcome.

On the basis of the foregoing Findings of Fact and Conclusions of Law it is hereby ORDERED, JUDGED and DECRRED:

That the plaintiff's motion for summary judgment on the foregoing grounds is hereby denied without prejudice to the plaintiff's remaining contentions of fact and law.

DATED this 8th day of October, 1986.

/s/ John W. Riley
JOHN W. RILEY
Judge

THE SUPREME COURT OF WASHINGTON

No. 56377-2

FIRST COVENANT CHURCH OF SEATTLE, WASHINGTON,
Appellant,

v.

THE CITY OF SEATTLE,
Respondent.

ORDER DENYING MOTION FOR RECONSIDERATION

The Court having decided by majority vote that the respondent's motion for reconsideration should be denied.

It is ordered that the motion be and it hereby is denied.

Dated this 12th day of September, 1990.

/s/ [Illegible]
Chief Justice

Chapter 25.12

LANDMARKS PRESERVATION

Subchapter I Title and Purpose

25.12.010 Short title.

This chapter may be cited as the "Landmarks Preservation Ordinance."

(Ord. 106348 § 1.01, 1977.)

25.12.020 Purpose and declaration of policy.

A. The City's legislative authority finds that the protection, enhancement, perpetuation and use of sites, improvements and objects of historical, cultural, architectural, engineering or geographic significance, located within the City, are required in the interest of the prosperity, civic pride and general welfare of the people; and further finds that the economic, cultural and aesthetic standing of this City cannot be maintained or enhanced by disregarding the heritage of the City and by allowing the unnecessary destruction or defacement of such cultural assets.

B. The purposes of this chapter are: (1) to designate, preserve, protect, enhance and perpetuate those sites, improvements and objects which reflect significant elements of the City's cultural, aesthetic, social, economic, political, architectural, engineering, historic or other heritage, consistent with the established long-term goals and policies of the City; (2) to foster civic pride in the beauty and accomplishments of the past; (3) to stabilize or improve the aesthetic and economic vitality and values of such sites, improvements and objects; (4) to protect and enhance the City's attraction to tourists and visitors; (5) to promote the use of outstanding sites, improvements and objects for the education, stimulation and welfare of the people of the City; and (6) to promote and encourage

continued private ownership and use of such sites, improvements and objects now so owned and used, to the extent that the objectives listed above can be attained under such a policy.

(Ord. 106348 § 1.02, 1977.)

Subchapter II Definitions

25.12.030 Definitions generally.

The words and terms set out in this subchapter, when used in this chapter, unless a different meaning clearly appears from the context shall mean as follows.

(Ord. 109125 § 16(part), 1980: Ord. 106348 § 1.03 (part), 1977.)

25.12.040 Alteration.

"Alteration" is any construction, modification, demolition, restoration or remodeling for which a permit from the Director of Construction and Land Use is required.

(Ord. 109125 § 16 (part), 1980: Ord. 106348 § 1.03(1), 1977.)

25.12.050 Approval of designation.

"Approval of designation" is final action by the Landmarks Preservation Board identifying an object, improvement or site as a landmark or landmark site.

(Ord. 109125 § 16(part), 1980: Ord. 106348 § 1.03(2), 1977.)

25.12.060 Approval of nomination.

"Approval of nomination" is an action by the Landmarks Preservation Board approving a nomination, in whole or in part, for further designation proceedings.

(Ord. 109125 § 16(part), 1980: Ord. 106348 § 1.03(3), 1977.)

25.12.070 Board.

"Board" is the Landmarks Preservation Board.

(Ord. 109125 § 16(part), 1980: Ord. 106348 § 1.03(4), 1977.)

25.12.080 Certificate of approval.

"Certificate of approval" is written authorization which must be issued by the Board before any alteration or significant change may be made to the controlled features of a landmark or landmark site, or during the pendency of designation proceedings, to a site, improvement or object after its nomination has been approved by the Board for further proceedings.

(Ord. 109125 § 16(part), 1980: Ord. 106348 § 1.03(5), 1977.)

25.12.090 Controls.

"Controls" are such specific restrictions as may be imposed by a designating ordinance, upon the alteration or the making of significant changes of specific features or characteristics of a landmark site or landmark that are designated for preservation by such designating ordinance.

(Ord. 109125 § 16(part), 1980: Ord. 106348 § 1.03(6), 1977.)

25.12.100 Council.

"Council" is the City Council of the City of Seattle.

(Ord. 109125 § 16(part), 1980: Ord. 106348 § 1.03(7), 1977.)

25.12.110 Designating ordinance.

"Designating ordinance" is an ordinance enacted pursuant to this chapter for the purpose of declaring an object, improvement or site a landmark, or a landmark site, and specifying the controls and any economic incentives applicable thereto, and shall include any ordinance

designating a landmark in accordance with Ordinance 102229.[1]

(Ord. 109125 § 16 (part), 1980: Ord. 160348 § 1.03(8), 1977.)

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[1] Editor's Note: Ord. 102229 is the previous landmarks preservation ordinance.

25.12.115 Director of Construction and Land Use.

"Director of Construction and Land Use" is the Director of the Department of Construction and Land Use of the City or such other official as may be designated from time to time to issue permits for construction, alteration, reconstruction, or demolition of improvements upon real property in the City.

(Ord. 109125 § 16(part), 1980: Ord. 106348 § 1.03(9), 1977.)

25.12.120 Economic incentives.

"Economic incentives" are such compensation, rights, or privileges or combination thereof, which the Council, or other public body or agency, by virtue of applicable present or future legislation, may be authorized to grant to or obtain for the owner as consideration for the imposition of controls on a designated landmark site or landmark.

Examples of econmic incentives include tax relief, conditional use permits, rezoning, street vacation, planned unit development, transfer of development rights, facade easements, named gifts, preferential leasing policies, private or public grants-in-aid, beneficial placement of public improvements, or amenities, or the like.

(Ord. 109125 § 16(part), 1980: Ord. 106348 § 1.03(10), 1977.)

25.12.130 Hearing Examiner.

"Hearing Examiner" means any person authorized to act as a Hearing Examiner pursuant to the Administrative Code of the City (Ordinance 102228)[1] or any ordinance amendatory or successor thereto.

(Ord. 109125 § 16(part), 1980: Ord. 106348 § 1.03(11), 1980.)

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[1] Editor's Note: The Administrative Code is codified in Chapter 3.02 of this Code.

25.12.140 Improvement.

"Improvement" is any building, structure, or other object constituting a physical improvement of real property.

(Ord. 109125 § 16(part), 1980: Ord. 106348 § 1.03(12), 1977.)

25.12.150 Interested person of record.

"Interested person of record" includes any individual, corporation, partnership or association which notifies the Board in writing of its interest in any matter before the Board.

(Ord. 109125 § 16(part), 1980: Ord. 106348 § 1.03(13), 1977.)

25.12.160 Landmark.

"Landmark" is an improvement or object designated as a landmark pursuant to this chapter, or pursuant to Ordinance 102229.[1]

(Ord. 109125 § 16(part), 1980: Ord. 106348 § 1.03(14), 1977.)

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[1] Editor's Note: Ord. 102229 is the previous landmarks preservation ordinance.

25.12.170 Landmark site.

"Landmark site" is a site designated as a landmark site pursuant to this chapter.

(Ord. 109125 § 16(part), 1980: Ord. 106348 § 1.03(15), 1977.)

25.12.180 Nomination.

"Nomination" is the act of proposing that any object, site or improvement be designated a landmark or landmark site.

(Ord. 109125 § 16(part), 1980: Ord. 106348 § 1.03(16), 1980.)

25.12.190 Object.

"Object" is any tangible thing, including any ship, which may or may not be attached to real property.

(Ord. 109125 § 16(part), 1980: Ord. 106348 § 1.03(17), 1980.)

25.12.200 Owner.

"Owner" is a person having a fee simple interest, a substantial beneficial interest of record or a substantial beneficial interest known to the Board in an object, site or improvement.

(Ord. 109125 § 16(part), 1980: Ord. 106348 § 1.03(18), 1977.)

25.12.210 Party of record.

"Party of record" includes the Board, the owner, the person in charge, and the nominator of any proposed landmark or landmark site, and the Hearing Examiner, when appropriate.

(Ord. 109125 § 16(part), 1980: Ord. 106348 § 1.03(19), 1977.)

25.12.220 Person.

"Person" is an individual, partnership, corporation, group or association.

(Ord. 109125 § 16(part), 1980: Ord. 106348 § 1.03(20), 1977.)

25.12.230 Person in charge.

"Person in charge" is the person or persons in possession of an object or of an improved lot or parcel including but not limited to a mortgagee or vendee in possession, an assignee of rents, a receiver, executor, trustee, lessee, tenant, agent, or any other person directly or indirectly in control of an object or of an improved lot or parcel of real property.

(Ord. 109125 § 16(part), 1980: Ord. 106348 § 1.03(21), 1977.)

25.12.240 Significant change.

"Significant change" is any change in appearance not requiring a permit from the Director of Construction and Land Use, but for which a certificate of approval is expressly required by a Board approval of nomination, a Board report on designation, or a designating ordinance.

(Ord. 109125 § 16(part), 1980: Ord. 106348 § 1.03(22), 1977.)

25.12.250 Site.

"Site" is any area of land which is unimproved except for trees, shrubs, and/or plants.

(Ord. 109125 § 16(part), 1980: Ord. 106348 § 1.03(23), 1977.)

25.12.260 Superintendent.

"Superintendent" is the Director of Construction and Land Use of the City or such other official as may be

designated from time to time to issue permits for construction, alteration, reconstruction, or demolition of improvements upon real property in the City.

(Ord. 109125 § 16(part), 1980: Ord. 106348 § 1.03(24), 1977.)

Subchapter III Landmarks Preservation Board

25.12.270 Creation.

There is created the Landmarks Preservation Board (hereinafter called the "Board") which shall consist of eleven (11) members. The membership of the Board shall consist of at least two (2) architects, (one (1) of whom may be a landscape architect), two (2) historians, one (1) representative from the City Planning Commission, one (1) structural engineer, one (1) representative from the field of real estate management, and one (1) representative from the field of finance. Three (3) additional members shall also be appointed without regard to occupation or affiliation. All Board members shall have a demonstrated sympathy with the purposes of this chapter.

(Ord. 106348 § 2.01(a), 1977.)

25.12.280 Membership.

Members of the Landmarks Preservation Board established under Ordinance 102229 [1] are appointed members of the Board established pursuant to this chapter to serve for the remainder of the terms to which they were originally appointed, and in addition, one (1) new member shall be appointed for a three (3) year term and one (1) new member shall be appointed for a two (2) year term. Thereafter all members of the Board shall be appointed by the Mayor, subject to confirmation by the Council, for a term of three (3) years, which appointments shall be

made in such a manner that the composition specified in this subchapter is maintained.

(Ord. 106348 § 2.01(b), 1977.)

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[1] Editors Note: Ord. 102229 is the previous landmarks preservation ordinance.

25.12.290 Vacancy filling.

In the event of a vacancy, an appointment shall be made to fill the vacancy in the same manner as if at the beginning of the term. The person appointed to fill the vacancy shall hold for the unexpired term, and if the vacancy being filled was occupied by a person meeting one (1) of the enumerated qualifications, the newly appointed member shall meet that same qualification. No member shall serve for more than two (2) terms consecutively; provided that for the purpose of this limitation a member shall be deemed to have served one (1) term if such member resigns after being appointed for any period of time, and provided further that "one (1) term" shall include an unexpired term of two (2) years or more. Members of the Board shall serve without compensation.

(Ord. 106348 § 2.01(c), 1977.)

25.12.300 Rules and regulations.

The Board shall elect a Chairperson from among its members, and shall within six (6) months adopt in accordance with the Administrative Code (Ordinance 102228),[1] and file with the City Comptroller rules and regulations, including a code of ethics for its members, for its organization and procedures consistent with this chapter. The Board shall not conduct any public hearing required under this chapter until rules and regulations have been filed.

(Ord. 106348 § 2.02(a), 1977.)

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[1] Editor's Note: The Administrative Code is codified in Chapter 3.02 of this Code.

25.12.310 Quorum—Voting.

A majority of the current appointed and confirmed members of the Board shall constitute a quorum for the transaction of business. All official actions of the Board, with the exception of votes on approval of designation, shall require a majority vote of the members present and voting. Votes on approval of designation shall require a majority vote of the then current appointed and confirmed members of the Board. No member shall be eligible to vote upon any matter required by this chapter to be determined after a hearing unless that member has attended the hearing or familiarized him or herself with the record.

(Ord. 106348 § 2.02(b), 1977.)

25.12.320 Staff—Historic Preservation Officer.

The Director of the Department of Community Development shall provide adequate staff support to the Landmarks Preservation Board and shall assign a member of the Department's staff to act as Historic Preservation Officer. Under the direction of the Board, the Historic Preservation Officer shall be the custodian of the Board's records, conduct official correspondence, assist in organizing and supervising the Landmarks Preservation Board, conduct official correspondence, organize and supervise the Board staff and the clerical and technical work of the Board to extent required to administer this chapter. In addition, the Historic Preservation Officer shall:

A. Carry out, assist and collaborate the studies and programs designed to identify and evaluate objects, improvements and sites worthy of preservation:

B. Consult with and consider the ideas and recommendations of civic groups, public agencies, and citizens interested in historic preservation;

C. Inspect and investigate objects, improvements and sites which are believed worthy of preservation;

D. Officially recognize design excellence in the rehabilitation of objects, improvements and other features deemed deserving of official recognition although not designated as landmark sites or landmarks and encourage appropriate measures for such recognition;

E. Disseminate information to the public concerning those objects, improvements and sites deemed worthy of preservation, and encourage and advise owners in the protection, enhancement and perpetuation of such objects, improvements and sites;

F. Consider methods other than those provided for in this chapter for encouraging and achieving historical preservation, and make appropriate recommendations to the Council and to other bodies and agencies, both public and private;

G. Recommend such policies, rules and regulations for adoption by the Board as are deemed necessary to carry out the purposes of this chapter;

H. Subject to such limitations and within such standards as the Board may establish from time to time, grant certificates of approval all without prejudice to the right of the owner at any time to apply directly to the Board for its consideration and action on such matters.

(Ord. 106348 § 2.03, 1977.)

25.12.330 Board meetings.

All meetings of the Board shall be open to the public. The Board shall keep minutes of its proceedings, showing the action of the Board upon each question, and shall keep records of all official actions taken by it, all of which shall be filed in the office of the Historic Preservation Officer and shall be public records.

(Ord. 106348 § 2.04, 1977.)

25.12.340 Electronic record of hearings.

At all hearings before the Board, all oral proceedings shall be electronically recorded. Such proceedings may also be recorded stenographically by a court reporter if any interested person at his or her expense shall provide a court reporter for that purpose. A copy of the record or any part thereof, whether recorded stenographically or electronically, shall be transcribed and furnished to any person upon request therefor and payment of the reasonable costs thereof.

(Ord. 106348 § 2.05, 1977.)

Subchapter IV Designation of Landmark Sites

25.12.350 Standards for designation.

An object, site or improvement which is more than twenty-five (25) years old may be designated for preservation as a landmark site or landmark if it has signicant character, interest or value, as part of the development, heritage or cultural characteristics of the City, state, or nation and if it falls into one (1) of the following categories:

A. It is the location of, or is associated in a significant way with, an historic event with a significant effect upon the community, City, state, or nation; or

B. It is associated in a significant way with the life of a person important in the history of the City, state, or nation; or

C. It is associated in a significant way with a significant aspect of the cultural, political, or economic heritage of the community, City, state or nation; or

D. It embodies the distinctive visible characteristics of an architectural style, or period, or of a method of construction; or

E. It is an outstanding work of a designer or builder; or

F. Because of its prominence of spatial location, contrasts of siting, age, or scale, it is an easily identifiable visual feature of its neighborhood or the City and contributes to the distinctive quality or identity of such neighborhood or the City.

(Ord. 106348 § 3.01, 1977.)

25.12.360 Separate nomination and designation of site and object or improvement.

The nomination or designation of a site as a landmark site shall not constitute nomination or designation of any object or improvement located on the site as a landmark unless the object or improvement is nominated or designated as a landmark. The nomination or designation of an object or improvement as a landmark shall not constitute nomination or designation of the site on which the object or improvement is located as a landmark site unless the site is nominated or designated as a landmark site.

(Ord. 106348 § 3.02, 1977.)

25.12.370 Nomination.

Any person including the Historic Preservation Officer and any member of the Board may nominate any site, improvement or object for designation as a landmark or landmark site. Nominations may be made on official nomination forms provided by the Historic Preservation Officer, shall be filed with the Historic Preservation Officer, and shall include all data required by the Board. Nominations found to be in order by the Historic Preservation Officer shall be considered by the Board at a public meeting. The Historic Preservation Officer or the Board may amend or complete any nomination. A copy

of any nomination and of any amendments thereto shall be given the owner promptly.

(Ord. 106348 § 4.01, 1977.)

25.12.380 Notice of Board meeting on approval of nomination.

The Board may approve a nomination for further designation proceedings only at a public meeting. The Board shall make a reasonable effort to serve the owner of a nominated site, improvement or object with notice of any Board meeting at which such nomination shall be considered for approval by the Board, however, failure to serve such notice shall not invalidate any proceedings with respect to such nomination. Neither the attendance, and participation of the owner at the meeting to consider the nomination nor the owner's failure to so attend or participate shall prejudice the right of the owner to resist designation or the imposition of controls if the nomination is approved.

(Ord. 106348 § 5.01, 1977.)

25.12.390 Board approval of nomination.

A. If the Board, in whole or in part, approves a nomination for further designation proceedings, it shall in such approval:

1. Specify the legal description of the site, the particular features and/or characteristics proposed to be preserved, and such other description of the site, improvement or object as it deems appropriate;

2. Set a date, which is not less than thirty (30) nor more than forty-five (45) days from the date of approval of nomination, at which a public hearing on approval of designation shall be held as provided in Section 25.12.420.

B. If the Board approves a nomination, the provisions of Sections 25.12.670 through 25.12.780 shall apply.

(Ord. 106348 § 5.02, 1977.)

25.12.400 Notification of approval of nomination.

If the Board approves a nomination in whole or in part for further designation proceedings, the Historic Preservation Office shall within three (3) working days file a written notice of such action with the Superintendent and serve a copy of the same on the owner and interested persons of record. Such written notice shall include:

A. A copy of such approval of nomination;

B. A statement that while proceedings pursuant to this chapter are pending, and thereafter if a designating ordinance is enacted, a certificate of approval must be obtained before anyone may: (1) make alterations or significant changes to specific features or characteristics of the site, improvement or object suggested for preservation in the approval of nomination or thereafter specified in the report on approval of designation, or set forth in the decision of the Hearing Examiner; or (2) make alterations or significant changes to specific controlled features or characteristics of such landmark site or landmark specified in a designating ordinance; and

C. A statement of the date and time of the Board hearing on approval of designation;

D. A statement that all proceedings to review the action of the Board at the hearing on approval of designation will be based on the record made at such hearing and that no further right to present evidence on the issue of designation is afforded pursuant to this chapter.

(Ord. 106348 § 5.03, 1977.)

25.12.410 Disapproval of nomination.

If the Board disapproves the nomination, the proceedings shall terminate as provided in Section 25.12.850 A, and the Board shall set forth its reasons why approval of nomination is not warranted.

(Ord. 106348 § 5.04, 1977.)

25.12.420 Board hearing on approval of designation.

Except as otherwise provided in Section 25.12.470 the Board may approve or deny designation of a site, improvement or object only at a public hearing. At the hearing on approval of designation the Board shall receive evidence and hear arguments on whether the site, improvement or object meets the criteria for designation of landmarks and landmark sites specified in Section 25.12.350 and merits designation as a landmark or landmark site.

(Ord. 106348 § 6.01, 1977.)

25.12.430 Board action on approval of designation.

Whenever the Board approves designation of all or any portion of the site, improvement or object under consideration as a landmark or landmark site, it shall within fourteen (14) days issue a written report on designation which shall set forth:

A. The legal description of the site, the specific features and/or characteristics to be preserved, and such other description of the site, improvement or object as it deems appropriate;

B. Its reasons, analysis and conclusions supporting subsection A with specific reference to the criteria set forth in Section 25.12.350.

(Ord. 106348 § 6.02, 1977.)

25.12.440 Notice of report on designation.

A copy of the Board's report on designation shall be served on the owner and mailed to interested persons of record within three (3) working days after it is issued. If the Board acts to approve designation, the owner, at the time of service of the report shall also be served with a notice that:

A. States a date, which is not later than seventy-five (75) days after mailing of the report on designation, when the Board will consider controls and incentives, if any, to be applied for preservation of specific features or characteristics of the site, improvement or object in question.

B. Requests the owner to consult and confer with the Board staff to develop and agree upon controls and incentives; and

C. Informs the owner of the procedures of Sections 25.12.490 through 25.12.520.

(Ord. 106348 § 6.03, 1977.)

25.12.450 Disapproval of designation.

If the Board disapproves designation, the proceedings shall terminate as provided in Section 25.12.850A and the Board shall set forth its reasons why approval of designation is not warranted.

(Ord. 106348 § 6.04, 1977.)

25.12.460 Consultation with owner.

Following Board approval of nomination an owner may affirmatively indicate a desire to confer and consult with the Board and Board staff with a view toward reaching agreement on specific features and characteristics of the site, improvement or object to be preserved and methods of achieving such preservation, including controls and incentives.

(Ord. 106348 § 7.01, 1977.)

25.12.470 Procedure.

Upon receipt of written notice that the owner desires to confer and consult with the Board and Board staff under the provisions of Section 25.12.460, the Board staff and owner shall develop a schedule for such consultation

which shall not be subject to any time limitations set forth in other sections of this chapter. The Board shall establish procedures for consent proceedings under Sections 25.12.460 through 25.12.480 which shall insure that the Board's consideration of approval of designation and the Board's recommendation on controls and incentives are separate actions. If, for any reason, the Board and owner fail to reach agreement under this procedure and when either party informs the other in writing that an impasse has been reached, Section 25.12.520 shall apply.

(Ord. 106348 § 7.02, 1977.)

25.12.480 Requests for Council approval.

All requests for Council approval of reports and recommendations made pursuant to Sections 25.12.460 and 25.12.470 shall include a statement that such report or recommendation is made under the provisions of said sections and shall include a written statement from the owner concurring in such report or recommendation.

(Ord. 106348 § 7.03, 1977.)

Subchapter V Controls and Incentives

25.12.490 Negotiation with owner.

Promptly after service on the owner of the Board's report on designation, the Board staff shall commence to negotiate with the owner the application of controls on the site, improvement, or object, designed to preserve the specific features or characteristics identified in the Board's report on designation and the application of economic incentives, if any, to the owner of the site, improvement or object. If within fifteen (15) days of the commencement of the negotiation period, the owner fails to contact the Board staff, or notifies the staff that the owner declines to negotiate controls and incentives, the staff shall promptly prepare and transmit to the Board its recommendations for controls and incentives for the

subject site, improvement or object to be considered at a public meeting at the time and place specified in the notice of report on designation.

(Ord. 106348 § 8.01(a), 1977.)

25.12.500 Negotiations—Procedure and time requirements.

The negotiation period may run for a maximum of seventy-five (75) days from the date of service of the Board's report on designation on the owner. The negotiations shall terminate if either party concludes that an impasse has been reached and so notifies the other party in writing and if the other part does not object within seven (7) days after receipt of such notice. If the owner and the Board staff reach written agreement within the period allotted for negotiation, the Board staff shall promptly submit the agreement to the Board for approval at a Board meeting to be held not later than twenty (20) days after the written agreement is reached, or within such further time as the Board and owner may stipulate in writing. Notice of such Board meeting shall be served on the owner and mailed to interested persons of record at least fifteen (15) days prior to such meeting. Within three (3) working days after such meeting the Board shall serve upon the owner, and mail to interested persons of record, notice of its approval or disapproval of the agreement and specify the reasons therefor.

(Ord. 106348 § 8.01(b), 1977.)

25.12.510 Effect of Board approval of agreement.

If the agreement on controls and incentives between the Board staff and owner is approved by the Board, the Board shall transmit the agreement to the Council with a request for Council action pursuant to Sections 25.12.650 and 25.12.660.

(Ord. 106348 § 8.02, 1977.)

25.12.520 Effect of failure to agree or disapproval of agreement.

In the event the Board staff and the owner are unable to reach an agreement by negotiation, or in the event the agreement reached is disapproved by the Board, the Board shall file its recommendation on controls and economic incentives, if any, with the Hearing Examiner and serve same on the owner and the owner shall have an opportunity to file objections thereto. The controls proposed in such recommendation shall relate to the specific feature or features of the site, improvement or object which are to be preserved. The recommendation shall set forth the reasons and the need for each proposed specific control and for any proposed economic incentive and shall, in addition, state the circumstances under which a certificate of approval shall be required with respect to any alteration or significant change to the site, improvement or object if the proposed controls are imposed. The Board may hold a public hearing prior to the making of its recommendation.

(Ord. 106348 § 8.03, 1977.)

25.12.530 Filing of recommendation and objections with Hearing Examiner.

As provided in Section 25.12.520, in the event of a failure to agree on proposed controls and incentives or in the event of disapproval of an agreement, the Board shall file with the Hearing Examiner and serve upon the owner recommendations for proposed controls and incentives and the owner may file objections thereto. The recommendation of the Board shall be filed not later than one hundred eighty-five (185) days after the approval of nomination and not later than fifteen (15) days after the expiration of the maximum period permitted for negotiations if no written agreement was signed by the Board staff and the owner, or if an agreement, was signed within fifteen (15) days after the time has ex-

pired for the Board to approve or disapprove such a written agreement pursuant to Section 25.12.500. The owner's objections shall be filed not later than fifteen (15) days after receipt of the Board's recommendation on proposed controls and incentives. For good and sufficient cause shown by either the Board or owner, the Hearing Examiner may grant an extension of time not to exceed thirty (30) days. Any interested person of record may file with the Hearing Examiner written objections to the Board's recommendations on controls and economic incentives.

(Ord. 106348 § 9.01, 1977.)

25.12.540 Scheduling of hearing.

After the Board's recommendations and the owner's objections, if any, are filed with the Hearing Examiner, the Hearing Examiner shall set the matter for a hearing which shall be held within seventy (70) days of the receipt of the owners objections or the receipt of the Board's recommendations, whichever is later, and promptly notify the Board, owner and all interested persons of record of the date and time for the hearing.

(Ord. 106348 § 9.02, 1977.)

25.12.550 Expert advice.

After reasonable notice to the Board and owner, the Hearing Examiner may appoint an expert or experts to provide advice concerning the economic effects of the proposed controls and economic incentives.

(Ord. 106348 § 9.03, 1977.)

25.12.560 Hearing Examiner procedure.

Proceedings before the Hearing Examiner shall be in accordance with the procedures for hearings in contested cases pursuant to the Administrative Code (Ordinance

102228)[1], except as such procedures are modified by this chapter. Any person may testify at the hearing.

(Ord. 106348 § 9.04, 1977.)

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[1] Editor's Note: The Administrative Code is codified in Chapter 3.02 of this Code.

25.12.570 Basis for Hearing Examiner's recommendation.

On the basis of all the evidence presented at a hearing, the Hearing Examiner shall determine whether to recommend all or any of the proposed controls and economic incentives, and/or whether to recommend a modified version of any of the proposed controls or incentives. The Hearing Examiner, except upon written agreement with the owner, shall not recommend any control which directly regulates population density; provided that the Hearing Examiner may recommend a control which indirectly affects density by controlling a specific feature of a site, improvement or object. The Hearing Examiner shall not recommend any control which is not set forth with adequate specificity, or which is inconsistent with any provision of this chapter, or for which the reason and need is not established with respect to the specific features and characteristics of the site, improvement or object to be preserved, or which requires that the site, improvement or object be devoted to any particular use, or which imposes any use restrictions, or any control or incentive if the effect of such control, incentive or combination thereof would be to prevent the owner from realizing a reasonable return on the site, improvement, or object.

(Ord. 106348 § 9.05(a), 1977.)

25.12.580 Owners shall not be deprived of reasonable economic use.

In no event shall the recommendation of the Hearing Examiner or any proceedings under or application of this

chapter deprive any owner of a site, improvement or object of a reasonable economic use of such site, improvement or object.

(Ord. 106348 § 9.05(b), 1977.)

25.12.590 Factors to be considered.

Only the following factors may be considered in determining the reasonable return on a site, improvement or object:

A. The market value of the site, improvement or object in its existing condition taking into consideration the ability to maintain, operate or rehabilitate the site, improvement or object:

1. Before the imposition of controls or incentives, and

2. After the imposition of proposed specific controls and/or incentives;

B. The owner's yearly net return on the site, improvement or object, to the extent available, during the five (5) years prior to the imposition of specific controls and/or incentives;

C. Estimates of the owner's future net yearly return on the site, improvement or object with and without the imposition of proposed specific controls and/or incentives;

D. The net return and the rate of return necessary to attract capital for investment:

1. In such site, improvement or object and in the land on which the site, improvement or object is situated after the imposition of the proposed specific controls and/or incentives, if such information is available, or, if such information is not available.

2. In a comparable site, improvement or object and in the land on which such comparable site, improvement or object is situated; and

E. The net return and rate of return realized on comparable sites, improvements or objects not subject to controls imposed pursuant to this chapter.

(Ord. 106348 § 9.05(c), 1977.)

25.12.600 Information.

It shall be the responsibility of the owner or person in charge to provide the Hearing Examiner with such information as is necessary and sufficient to determine yearly net return under Section 25.12.590 B and C.

(Ord. 106348 § 9.05(d), 1977.)

25.12.610 Hearing Examiner recommendations—Referral to Council.

Within thirty (30) days after the hearing, the Hearing Examiner shall serve on the Board and the owner and file with the Council for such action as the Council may deem appropriate, a decision setting forth a recommendation of the proposed controls and any economic incentives, findings with respect to the specific controls so recommended, the reasons and need for the controls and any incentives recommended, and the effect of such controls and incentives.

(Ord. 106348 § 9.06, 1977.)

25.12.620 Right of appeal to Council.

Any party of record may appeal the findings and recommendations of the Hearing Examiner regarding controls and/or economic incentives by filing with the Council and serving on other parties of record a written notice of appeal within thirty(30) days after the Hearing Examiner's decision is served on the party appealing.

(Ord. 106348 § 10.01, 1977.)

25.12.630 Procedure on appeal to Council.

A. Any appeal from the findings and recommendation of the Hearing Examiner shall be considered by the Council on the record only. The Hearing Examiner shall promptly prepare, certify and file with the Council such record which shall consist of all documents and exhibits submitted to the Hearing Examiner (except to the extent that the same are already before the Council) and a transcript of all oral proceedings before the Hearing Examiner. The appellant shall be responsible for the reasonable costs of preparation of the record unless the appeal is sucessful, in which event the Council may apportion such reasonable costs as it deems appropriate.

B. The Council or committee to which such appeal is referred shall notify the Board and any appellant of the procedures established for such hearing and of the date and time when it will hear oral argument, if any, from the parties or their representatives upon the issues which are the subject of such appeal. Such notice shall be served upon the Board and the owner not less than twenty (20) days before the date of such oral argument.

(Ord. 106348 § 10.02, 1977.)

25.12.640 Council action on appeal.

The Council may conclude such an appeal by enacting a designating ordinance as provided in Sections 25.12.650 and 25.12.660, adopting a committee report denying designation, or by such other action it deems appropriate.

(Ord. 106348 § 10.03, 1977.)

25.12.650 Designating ordinance—Generally.

Pursuant to the procedures set forth in this chapter, the Council may by ordinance specify controls and economic incentives with respect to sites, improvements or objects designated by the Board and pursuant to such

procedures the Council may by ordinance amend or repeal any such designating ordinance; provided:

A. That if an ordinance designating a landmark or a landmark site imposes specific controls upon such landmark or landmark site, no proceedings may be commenced under this chapter to impose other or further controls on such landmark or landmark site within four (4) years from the effective date of such designating ordinance without the agreement of the owner in writing; and

B. That if any landmark or landmark site is substantially destroyed by fire, earthquake or other casualty not envisioned at the time of designation, the owner may petition the Board to revoke the designation.

(Ord. 106348 § 11.01(a), 1977.)

25.12.660 Designating ordinance—Information required.

A. Each designating ordinance, and each ordinance amendatory thereof, shall include:

1. The legal description of the site, improvement or object;

2. The specific features or characteristics which are designated to be preserved;

3. The reasons and basis for such designation; and

4. The specific controls imposed and any economic incentives granted or to be granted or obtained with respect to such site, improvement or object.

B. A certified copy of each such ordinance shall be recorded with the King County Director of Records and Elections and served on the owner and on the person in charge of such landmark site or landmark.

(Ord. 106348 § 11.01(b), 1977.)

Subchapter VI Alterations or Significant Changes

25.12.670 Requirement of certificate of approval.

After the filing of an approval of nomination with the Superintendent and thereafter as long as proceedings for a designation are pending or a designating ordinance so requires, a certificate of approval must be obtained, or the time for denying a certificate of approval must have expired, before the owner may:

A. Make alterations or significant changes to specific features or characteristics of the site, improvement or object suggested for preservation in the approval of nomination, or thereafter specified in the report on approval of designation of the decision of the Hearing Examiner, whichever was issued most recently, while proceedings under this chapter are pending; or

B. Make alterations or significant changes which would be in violation of specific controls imposed by a designating ordinance.

(Ord. 106348 § 12.01, 1977.)

25.12.680 Application for certificate of approval—Filing.

Application for a certificate of approval may be made by filing an application for such certificate with the Board, or by filing with the Superintendent an application for a permit to make alterations or significant changes for which a certificate of approval is required because of the pendency of designation proceedings, or the terms of a designating ordinance. The Board may consider or issue a certificate of approval without the submission of final drawings, plans or specifications.

(Ord. 106985 § 6(part), 1977: Ord. 106348 § 12.02(a), 1977.)

25.12.690 Application for certification of approval—In conjunction with permit application.

If before a certificate of approval is obtained, an application is made to the Superintendent for a permit for which a certificate of approval is required, the Superintendent shall promptly refer such application to the Board and such application shall be deemed an application for a certificate of approval. The Superintendent shall continue to process such application, but shall not issue any such permit until the time has expired for filing with the Superintendent the notice of denial of a certificate of approval or a certificate of approval has been issued pursuant to this chapter; provided that if by its terms or the provisions of Section 25.12.810 the operation of such certificate of approval is suspended the Superintendent shall not issue such permit until the suspension terminates.

(Ord. 106985 § 6(part), 1977: Ord. 106348 § 12.02(b), 1977.)

25.12.700 Application for certificate of approval—Similar changes.

After the Board has commenced proceedings for the consideration of any application for a certificate of approval for a particular alteration or significant change, by giving notice of a hearing pursuant to Section 25.12.720 or otherwise, no other application for the same or a similar alteration or significant change may be made until such proceedings and all appeals therefrom pursuant to this chapter have been concluded.

(Ord. 106985 § 6(part), 1977: Ord. 106348 § 12.02(c), 1977.)

25.12.710 Fee for certificate of approval.

The fee for such certificate of approval shall be according to the Permit Fee Ordinance (106106).[1]

(Ord. 106985 § 6(part), 1977: Ord. 106348 § 12.02(d), 1977.)

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[1] Editor's Note: Ord. 106106 has been repealed by Ord. 107379. The current Permit Fee Ordinance is codified in Title 22 of this Code.

25.12.720 Board hearing on certificate of approval.

Within thirty (30) days after the filing of an application for a certificate of approval with the Board or the referral of an application to the Board pursuant to Sections 25.12.680 or 25.12.690, the Board shall hold a hearing thereon and shall serve notice of the hearing on the owner and the applicant not less than ten (10) days before the date of the hearing; provided that no hearing shall be required if the Board, the owner and the applicant agree in writing to a stipulated certificate of approval approving the requested alterations or changes with such modifications as may be agreed upon. If an agreement on a stipulated certificate of approval is reached or if, after a hearing, the Board orders a certificate of approval, such certificate shall be issued forthwith and the Board shall file a certified copy of such certificate with the Superintendent.

(Ord. 106348 § 12.03, 1977.)

25.12.730 Board decision on certificate of approval.

The Board shall issue a written decision either granting or denying a certificate of approval not later than forty-five (45) days after the filing of the application for permit with the Superintendent or after the filing of an application for a certificate of approval with the Board and shall serve a copy thereof upon the owner, the applicant and the Superintendent within three (3) work-

ing days afer such grant or denial. A decision denying a certificate of approval or attaching conditions to the grant of a certificate of approval shall contain an explanation of the reasons for the Board's decision and specific findings with respect to the factors enumerated in Section 25.12.750. Except by written agreement with the owner and the applicant, neither the Board nor the Hearing Examiner may attach any conditions to the grant or denial of the certificate of approval, if the effect of such conditions would be to impose controls which are prohibited by this chapter, or if such conditions would otherwise be inconsistent with the provisions of this chapter or any applicable designating ordinance.

(Ord. 106348 § 12.04, 1977.)

25.12.740 Appeal to Hearing Examiner.

Any interested person of record may appeal to the Hearing Examiner the decision of the Board to grant, deny or attach conditions to a certificate of approval by serving written notice of appeal upon the Board and filing such notice and a copy of the Board's decision with the Hearing Examiner within fifteen (15) days after such grant, denial or conditional grant. Except as otherwise specified in Sections 25.12.670 through 25.12.780, the Hearing Examiner shall hold a hearing in the same manner as provided in Sections 25.12.530 through 25.12.610 for hearings on the application of controls and economic incentives.

(Ord. 106348 § 12.05, 1977.)

25.12.750 Factors to be considered by Board or Hearing Examiner.

In considering any application for a certificate of approval the Board, and the Hearing Examiner upon any appeal, shall take into account the following factors:

A. The extent to which the proposed alteration or significant change would adversely affect the specific fea-

tures or characteristics specified in the latest of: the Board approval of nomination, the Board report on approval of designation, the stipulated agreement on controls, the Hearings Examiner's decision on controls, or the designating ordinance;

B. The reasonableness or lack thereof of the proposed alteration or significant change in light of other alternatives available to achieve the objectives of the owner and the applicant; and

C. The extent to which the proposed alteration or significant change may be necessary to meet the requirements of any other law, statute, ordinance, regulation, code or ordinance; and

D. Where the Hearing Examiner has made a decision on controls and economic incentives, the extent to which the proposed alteration or significant change is necessary or appropriate to achieving for the owner or applicant a reasonable return on the site, improvement or object, taking into consideration the factors specified in Sections 25.12.570 through 25.12.600 and the economic consequences of denial; provided, that in considering the factors specified in Section 25.12.590 for purpose of this subsection, references to times before or after the imposition of controls shall be deemed to apply to times before or after the grant or denial of a certificate of approval.

(Ord. 106348 § 12.06, 1977.)

25.12.760 Hearing Examiner procedure.

A. The Hearing Examiner shall serve notice of the date of the hearing on the parties not less than twenty (20) days before the hearing and shall hold a hearing not later than eighty (80) days after the filing of the application for a certificate of approval. The Hearing Examiner shall issue a decision within fourteen (14) days after the conclusion of the hearing and shall serve

the decision on the Board, the owner and the applicant and file the same with the Superintendent within three (3) working days thereafter.

B. The Hearing Examiner may appoint an expert or experts to provide advice or report concerning the economic effect of the denial of a certificate of approval or the imposition of proposed conditions. The Hearing Examiner shall receive evidence at the hearing upon the factors specified in Section 25.12.750 and in reaching a decision shall make findings on such factors. If the Hearing Examiner determines that there is no showing of a significant change in circumstances since a previous application for a similar certificate, the appeal shall be denied.

(Ord. 106348 § 12.07, 1977.)

25.12.770 Failure of timely decision.

If the Board or Hearing Examiner fails to issue and serve a written decision upon the Superintendent, the owner, and the applicant within the times specified in Section 25.12.730, of as the same may be extended in accordance with Section 25.12.850 D, an unconditional certificate of approval shall be deemed to have been granted and the Superintendent shall issue all necessary permits for the proposed alteration when all other requirements for issuance have been satisfied.

(Ord. 106348 § 12.08, 1977.)

25.12.780 Appeal to Council.

The decision of the Hearing Examiner shall be final unless the action proposed by the owner or applicant involves demolition of an improvement, or destruction of an object, or an estimated cost of One Hundred Thousand Dollars ($100,000.00) or more. In any such case, the owner or the applicant may appeal on the record to the Council any decision of the Hearing Examiner which

denies, or attaches conditions to the grant of a certificate of approval, by filing written notice of appeal with the Hearing Examiner, the Board and the Council within fifteen (15) days after such decision. The proceedings and procedure on such appeal shall be in accordance with Section 25.12.630 except that the Council shall adopt a resolution embodying its decision not later than two hundred thirty (230) days after the filing of the application for a certificate of approval and shall serve a copy of such resolution upon the Superintendent, the owner, and the applicant not later than three (3) working days thereafter.

(Ord. 106348 § 12.09, 1977.)

25.12.790 Suspension by the Board.

An order of the Board granting a certificate of approval for a proposed alteration which involves demolition of any protected features of a site, improvement or object may provide that the operation of the certificate shall be suspended for a period of time not to exceed sixty (60) days unless extended pursuant to Section 25.12.810.

(Ord. 106348 § 13.01, 1977.)

25.12.800 Suspension by Hearing Examiner.

A. If an appeal has been taken from a Board decision granting, denying, or conditionally granting a certificate of approval for a proposed alteration which involves demolition of all or any part of the protected features of a site, improvement or object then:

1. During the appeal proceedings the Board shall investigate the feasibility of developing a plan meeting the requirements of Section 25.12.810 A; and

2. The Board shall present evidence thereon to the Hearing Examiner.

B. If on such appeal the Hearing Examiner determines that a certificate of approval should be granted or that one or more of the conditions previously adopted by the Board should be revoked or modified and if there is a showing of a reasonable cause to believe that the subject plan is feasible, the order of the Hearing Examiner ordering the granting of a certificate of approval for such alteration may provide that the operation of the certificate shall be suspended for a period not to exceed thirty (30) days unless extended pursuant to Section 25.12.810.

(Ord. 106348 § 13.02, 1977.)

25.12.810 Effect of suspension of certificate of approval.

When the operation of a certificate of approval is suspended, the following provisions shall apply:

A. The Board, in consultation with the owner and the applicant, shall attempt to prepare a plan under which the site, improvement or object or protected features thereof may be preserved or perpetuated in such manner or form as to both effectuate the purpose of this chapter and to render the site, improvement or object capable of realizing a reasonable return.

B. If written agreement on such a plan is not reached within thirty (30) days of the issuance of such certificate the Board may, within ten (10) days after the expiration of said time, file with the Mayor and Superintendent and serve on the owner and the applicant a written recommendation that the City acquire a specified appropriate protective interest in the property and the filing of such recommendation shall extend the period of suspension until termination in accordance with Section 25.12.820.

(Ord. 106348 § 13.03, 1977.)

25.12.820 Termination of suspension.

The suspension of a certificate of approval shall terminate:

A. If the recommendation provided for in Section 25.12.810B is not served and filed in a timely fashion; or

B. If within ninety (90) days after the service and filing of such recommendation, the City neither commences a court action to condemn such interest or any other appropriate protective interest agreed upon by the Mayor and the Board, nor enters into a contract with the owner to acquire such interest; or

C. Upon the expiration of the period of suspension when no recommendation has been filed.

(Ord. 106348 § 13.04, 1977.)

25.12.830 Effect of termination of suspension.

Whenever a suspension terminates, the Superintendent shall forthwith issue the permit if all other requirements for the issuance of a permit shall have been met.

(Ord. 106348 § 13.05, 1977.)

Subchapter VII General Provisions

25.12.840 Service of notices.

A. Notices, decisions, and any other instruments or documents required to be served upon the owner pursuant to this chapter shall be served by mailing the same: (1) to the person shown to be the owner on the records of the Department of Finance of King County, Washington, to the address therein given and to such other addresses as may be ascertained from telephone or Polk directory listings for the City; and (2) to the owner's attorney where the files or records of the Board, the Hearing Examiner, or the Council, reveal representation in such proceedings by an attorney; and (3) to the person in charge of a site, improvement or object. Notices, applications, other instruments or documents required to be served upon the Board shall be served by delivering the same to the Historic Preservation Officer or by mail-

ing the same either to the Historic Preservation Officer or to the Landmarks Preservation Board at the then current address for such Officer or Board. Transmittals by mail shall be sent by first-class mail, certified with return receipt requested and with postage prepaid. Service shall be deemed to have been given when all of the steps specified above have been completed. Failure to send notice by mail to any owner whose address is not listed in the above sources, and failure to give actual notice to any owner whose name and address is unknown, shall not invalidate any proceedings in connection with the proposed designation.

B. Notice to parties of record shall include at least those documents sent to the owner. Such notice shall be served by first-class mail.

C. Notice to interested persons of record shall include at least the following: a description of the most recent action taken by the Board, the Hearing Examiner or Council; the time and place of the next public meeting or hearing, if any; the procedure to be followed at such meeting or hearing; the rights of appeal available, if applicable; and the time and place where documents in the record may be inspected. Such notice shall be served by first-class mail.

D. The Historic Preservation Officer may give such other notice as he may deem desirable and practicable.

(Ord. 106348 § 14.01, 1977.)

25.12.850 Termination of proceedings.

A. In any case where a site, improvement or object is nominated for designation as a landmark site or landmark and thereafter the Board fails to approve such nomination or to adopt a report approving designation of such site, improvement or object, such proceeding shall terminate and no new proceeding under this chapter may be commenced with respect to such site, improvement or

object within five (5) years from the date of such termination without the written agreement of the owner.

B. In any case where a site, improvement or object has been designated by the Board, in the absence of a written agreement with the owner deferring consideration of the imposition of controls or Board approval of a negotiated agreement pursuant to Section 25.12.500, such proceeding shall terminate and no new proceeding under this chapter with respect to such site, improvement or object may be commenced within four (4) years from the date of such termination without the written agreement of the owner if:

1. The Board fails to file with the Hearing Examiner its statement of proposed controls within the time prescribed in Section 25.12.530; or

2. The Hearing Examiner does not issue a decision which recommends controls, together with a proposed form of designating ordinance, within one hundred (100) days after the filing of the Board's recommendations on controls and incentives, or within such further time as the Board and the owner may agree to by written stipulation; provided, that if the Hearing Examiner issues a decision which does not recommend controls such proceedings shall terminate if no appeal is filed with the City Council within the time limited for filing such appeal.

C. In any case where a designating ordinance imposing specific controls is enacted, no further proceedings under this chapter to impose other or further controls on such landmark or landmark site may be commenced within four (4) years from the effective date of such designating ordinance without the written agreement of the owner.

D. When delays in the proceedings pursuant to this chapter result from any of the following:

1. The owner's request for a continuance or extension; or

2. The owner's stipulation to a continuance or extension; or

3. The requirements of any other ordinances or any statutes; or

4. The institution of court proceedings challenging proceedings under any section of this chapter;

then, the time limits specified in this chapter shall be extended accordingly, and in the case of the institution of court proceedings such time periods will be stayed until the termination of such court action.

(Ord. 106348 § 14.02, 1977.)

25.12.860 Revision or revocation of designation, controls, incentives.

At the end of four (4) years after the effective date of a designating ordinance, the owner may file with the Board an application to revoke designation of a site, improvement or object as a landmark site or landmark or an application to modify or revoke the controls or economic incentives previously established with respect thereto. Proceedings with respect to any such application shall proceed in the manner specified in Sections 25.12.380 through 25.12.640; provided that the burden shall be on the owner to demonstrate that a substantial change in circumstances has occurred to justify revision or revocation. Revocation of designation shall have the further effect of the termination of all controls and all present and future benefits from granted economic incentives. Termination of revocation or revision proceedings shall have the effects specified in Section 25.12.850.

(Ord. 106348 § 14.03, 1977.)

25.12.870 Staff reports and studies.

When a site, improvement or object is the subject of any proceeding pursuant to this chapter, the owner, upon request therefor, shall be promptly furnished with a copy

of all Board staff reports, inspections, and studies prepared for the use of the Board with respect to the issues under consideration. Unless otherwise expressly specified by the owner, a request for a copy of such report, inspection and studies shall be treated as a continuing request for copies of all such documents prepared until the proceeding has terminated.

(Ord. 106348 § 14.04, 1977.)

25.12.880 Economic incentives—City authorities.

All City authorities, including the Council, to the extent that they have the power to do so, may take such action as may be necessary to grant economic incentives, and may make any such action or grant conditional upon the subsequent enactment of a designating ordinance. When any application is made for the granting of recommended, requested or required economic incentives, all responsible City authorities shall give such application priority on their respective schedules and shall reach their respective decisions with all possible speed.

(Ord. 106348 § 14.05, 1977.)

25.12.890 Conformance with general development.

In all proceedings under this chapter, the Board and the Hearing Examiner shall consider and in their respective reports or decisions make findings on the conformance or lack of conformance of the proposed action with the desirable long-term overall development of the City, including, without limitation, any then existing comprehensive plan.

(Ord. 106348 § 14.06, 1977.)

25.12.900 Advice and guidance to property owners.

The Board may, upon request of the owner of the site, improvement or object, render advice and guidance with

respect to any proposed work on a landmark or landmark site.

(Ord. 106348 § 14.07, 1977.)

Subchapter VIII Enforcement and Penalties

25.12.910 Designated.

The Superintendent shall enforce this chapter and any designating ordinances enacted pursuant thereto or pursuant to Ordinance 102229 [1] and may, in addition to any other remedy or penalty provided in this chapter, seek injunctive relief for such enforcement. Anyone violating or failing to comply with the provisions of this chapter or any designating ordinance shall, upon conviction thereof, be fined a sum not exceeding Five Hundred Dollars ($500.00), and each day's violation or failure to comply shall constitute a separate offense; provided, however, that no penalty shall be imposed for any violation or failure to comply which occurs during the pendency of legal proceedings filed in any court challenging the validity of the provision or provisions of this chapter, as to which such violation or failure to comply is charged.

(Ord. 106348 § 14.08, 1977.)

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[1] Editor's Note: Ord. 102229 is the previous landmarks preservation ordinance.

ORDINANCE 112425

AN ORDINANCE relating to historic preservation, imposing controls upon the First Covenant Church, a Landmark designated by the Landmarks Preservation Board under Chapter 25.12 of the Seattle Municipal Code (Ordinance 106348).

WHEREAS, the Landmarks Ordinance, Chapter 25.12 of the Seattle Municipal Code (Ordinance 106348), establishes a procedure for the designation and preservation of structures and areas having historical, cultural, architectual, engineering or geographic importance; and

WHEREAS, The Landmarks Preservation Board after a public hearing on October 15, 1980, voted to approve the nomination of the First Covenant Church at 1500 Bellevue Avenue in Seattle as a Landmark under Code Chapter 25.12; and

WHEREAS, after a public hearing on January 7, 1981, the Board voted to approve the designation of the First Covenant Church as a Landmark under Code Chapter 25.12; and

WHEREAS, on April 22, 1981, the Board voted to adopt controls and incentives on the First Covenant Church and recommended to the City Council approval of those controls and incentives; and

WHEREAS, after a public hearing on June 3, 1981, the Hearing Examiner recommended that the controls and incentives be approved by the City Council; and

WHEREAS, on February 26, 1985, the Land Use Committee affirmed the recommendations of the Board and the Hearing Examiner; Now Therefore,

BE IT ORDAINED BY THE CITY OF SEATTLE AS FOLLOWS:

Section 1. That the designation by the Landmarks Preservation Board of the First Covenant Church, more particularly described as:

Twelfth Avenue Addition Replat,

Block 7, Lots 6 & 7.

as a Landmark based upon satisfaction of the following criteria of Code Section 25.12.350:

(1) It embodies the distinctive visible characteristics of an architectural style, or period, or of a method of construction; and

(2) Because of its prominence of spatial location, contrasts of siting, age, or scale, it is an easily identifiable visual feature of its neighborhood or the city and contributes to the distinctive quality or identity of such neighborhood or the city.

is hereby acknowledged.

Section 2. The following controls upon alteration of the landmark are hereby imposed:

A Certificate of Approval must be obtained or the time for denying a Certificate of Approval must have expired before the owner may make any alteration which requires a building permit, to any portion of the exterior of the building; Provided, that all in kind maintenance and repair of the exterior and any alterations which do not require a building permit shall be excluded from the Certificate of Approval requirements; and Provided further that nothing herein shall prevent any alteration of the exterior when such alterations are necessitated by changes in liturgy, it being understood that the owner is the exclusive authority on liturgy and is the decisive party in determining what architectural changes are appropriate to the liturgy. When alterations necessitated by changes in liturgy are proposed, the owner shall advise the Landmarks Preservation Board in writing of the nature of the proposed alterations and, the Board shall issue a Certificate of Approval. Prior to the issuance of any Certificate, however, the Board and owner shall

jointly explore such possible alternative design solutions as may be appropriate or necessary to preserve the designated features of the landmark.

Section 3. Enforcement of this Ordinance and penalties for its violation shall be as provided in Section 25.12.910 of the Seattle Municipal Code.

Section 4. The City Clerk is hereby directed to record this Ordinance with the King County Director of Records and Elections, deliver two copies to the City Historic Preservation Officer, 400 Yesler Building, and deliver one copy to the Director of the Department of Construction and Land Use.

Section 5. This ordinance shall take effect and be in force thirty days from and after its passage and approval, if approved by the Mayor; otherwise it shall take effect at the time it shall become a law under the provisions of the city charter.

Passed by the City Council the 9th day of September, 1985, and signed by me in open session in authentication of its passage this 9th day of September, 1985.

/s/ [Illegible]
President of the City Council

Approved by me this 17th day of September, 1985.

/s/ [Illegible]
Mayor

Filed by me this 17th day of September, 1985.

Attest: /s/ Tim Hill
City Comptroller and City Clerk

[SEAL]

Published .....

By /s/ Theresa Dunbar
Deputy Clerk

[Logo Omitted]

City of Seattle
Department of Community Development/
Office of Urban Conservation

Landmark Nomination Form

Name First Covenant Church (Swedish Tabernacle)
(Common, present or historic)

Year Built 1910-1911

Street and Number 1500 Bellevue Avenue

Assessor's File No. 872560-0465

Legal Description Plat Name Twelfth Avenue Addition Replat Block 7 Lot 6 & 7

Present Owner First Covenant Church

Present Use Religious

Address 1500 Bellevue Avenue

Original Owner First Covenant Church

Original Use Religious

Architect John A. Creutzer

Builder Alexander Pearson

Description: Present and original (if known) physical appearance and characteristics

---

First Covenant Church was built between 1910 and 1911 of masonry construction in an eclectic style derived from the northern renaissance. Its external form is based upon a rectangular, two-and-one-half story mass surmounted by a dome. It is prominently situated on a sloping corner lot just above a bend in Pike Street at the corner of Bellevue Avenue. Three elevations are exposed to view, with the fourth wall abutting a seven story apartment building.

The exterior of the church is faced in ashlar blocks of smooth-faced sandstone. The foundation is given a rusticated treatment with the upper stories laid in courses of alternating widths. The principal facade is organized into a series of seven bays, five of which are recessed behind engaged Tuscan columns. These are followed by a continuous doric entablature of sheet metal and a broad pediment which unifies the five central bays and engaged columns within an order similar to that of a free-standing portico. Both of the side elevation are ordered into a series of six bays defined by flat pilasters. These are also followed by the entablature and short parapet walls. Fenestration follows the two story plus basement floor configuration surrounding the auditorium and consists of rectangular windows most of which are divided by mullions and transoms in the form of christian crosses. Transom lights at the main story are embellished with tinted glass, and second story windows are entirely filled with tinted glass. Panelled spandrels separate the windows of the first and second stories within each bay. Small windows are placed asymmetrically at the southwest corner of the church to correspond with internal flights of stairs. Because of the sloping grade at the main facade, and the absence of an adequate setback necessary to allow for the provision of stairs, the pri-

mary entrance is located at the extreme-right of the facade where the grade rises to the level of the main floor. Basement level doorways are by contrast placed symmetrically at each end of the Bellevue Avenue facade where the gradient is even and level with the floor.

The church's most readily identifiable feature is its dome and cupola which rises from behind the parapet wall. The dome is ribbed, and elliptical in section, and is surmounted by a classical cupola consisting of a columned drum and a round dome.

The major interior space of the church consists of a large centric auditorium centered beneath the ribbed, interior shell of the dome. A rostrum and a choir are placed to one side of this space and semi circular seating, oriented and inclined toward the rostrum, is provided at the main floor and balcony levels. Seating at both levels extends well beyond the ring of marbleized columns supporting the dome. The balcony projects approximately six feet into the central space, and is embellished by an ornate plaster balustrade decorated with pannels and cartouches. A series of circular windows punctuate the lower portion of the dome between ribs, providing natural light to the interior. A large chandelier hangs from the center of the dome.

Statement of significance

First Covenant Church, also referred to as Swedish Tablenacle, is a significant part of Seattle's Swedish heritage. The church was first organized by Swedish immigrants in 1889 as the Swedish Mission Church. The present building represents the congregation's third religious edifice and replaces a smaller frame structure built in 1901. The present church was designed by architect John Creutzer who had earlier moved to Seattle from Spokane. It was constructed between 1910 and 1911.

First Covernant Church is also of architectural significance as a competent and relatively unaltered example of Renaissance inspired eclecticism. It is also one of only three domed structures of its type remaining in Seattle, sharing this distinction with the First United Methodist Church and the Langston Hughes Cultural Arts Center.

The church is also of important significance as an element of the townscape. Because of its prominent location just above a bend in Pike Street, the church terminates an important visual corridor. This relationship contributes to the distinctive identity of the surrounding neighborhood.

[Photographs Omitted in Printing]

Photographs:

[Photograph Omitted in Printing]

Submitted by: Office of Urban Conservation Staff

Address 400 Yesler Building Phone 625-4501

Date _____

Reviewed _____ Date _____
Historic Preservation Officer

FINDINGS AND RECOMMENDATIONS OF THE HEARING EXAMINER FOR THE CITY OF SEATTLE

In the Matter of the Recommendation of
the Landmarks Preservation Board for

FIRST COVENANT CHURCH

File No. LP-81-002

Introduction

The Landmarks Preservation Board (Board) filed its Recommendations on Controls and Incentives with the Hearing Examiner pursuant to Section 25.12.530, Seattle Municipal Code, for the First Covenant Church, located at 1500 Bellevue Avenue.

A hearing was held on this matter June 3, 1981. The property owner was represented by A.T. Wendells, Wendells, Froelich, Power and Lakefish; the Board by Assistant City Attorney James Fearn, Jr.

After due consideration of the evidence elicited during the public hearing, the following findings of fact and conclusions shall constitute the decision of the Hearing Examiner on this recommendation.

Findings of Fact

1. The subject property, the First Covenant Church, is located at 1500 Bellevue Avenue. The legal description is: Twelfth Avenue Replat, Block 7, Lots 6 and 7.

2. The church building, designed by John Creutzer, was erected in 1910-11. Located just above the bend in Pike Street, First Hill, the building features a ribbed dome, crowning cupola, and other distinguishing features.

3. By document of November 19, 1980, amended November 25, 1980, the Landmarks Preservation Board recommended designation of the church as a landmark based on the following code criterion:

> It embodies the distinctive visible characteristics of an architectural style, or period, or of a method of construction. Section 25.12.350(D), Seattle Municipal Code.

The supporting analysis characterized the building as an "architectuarally distinguished structure which embodies a classical design reminiscent of the northern renaissance." Board's Exhibit 2.

4. In addition, the Staff Recommendation determined that the "readly identifiable structure" contrasted sharply with the prevailing vicinity area flat roof forms; that its prominent siting on the north shoulder of First Hill just above a bend in Pike Street terminated an important visual corrider; and that the building represented "a conspicuous feature of the First Hill skyline when viewed from the Denny Regrade." The following ordinance criterion was deemed satisfied:

> Because of its prominence of spatial location, contrasts of siting, age, or scale, it is an easily identifiable visual feature of its neighborhood or the city and contributes to the distinctive quality or identity of such neighborhood or the city. Section 25.12.350 (F), Seattle Municipal Code.

5. The Notice of Report on Designation, issued January 21, 1981, stated that as to the features/characteristics to be preserved, the entire exterior of the church building should be preserved based on the criterion concerning spatial location, siting, scale:

> Because of its prominent siting and distinctive form the church contributes positively to the character and identity of the area.

6. The Staff Recommendation on Landmark Controls and Incentives was issued April 21, 1981, "To assure preservation of the specified features and characteristics of the . . . landmark.", the Recommendations required a

Landmarks Board Certificate of Approval before "alterations or significant changes to the exterior of the building where the changes would require application for a Building Permit." (Board's Exhibit 2.)

7. The Recommendation included provisos excluding in kind maintenance and repair and excluding liturgically necessary changes, so long as the owner communicates the nature of the proposed change for Board comment, and the Board and owner jointly explore alternative design features as appropriate. And, "if required the Board shall issue a Certificate of Approval."

8. In the Staff Recommendation for Designation, it was noted that the church entrance configuration had been altered in recent years with the closure of the "original entrance portals at the Pike Street facade." In point of fact the church has undergone two major remodelings, one in approximately 1948 and the other in 1970. The latter involved the complete change of the church's entrance way. Three of the prior four heavy wooden door entrances were eliminated in favor of a more open, translucent material.

9. The owner consistently objected to the designation and to the controls, citing concerns with the additional bureaucracy; with constitutionality of the Landmarks Ordinance; with the Board's failure to specify features to be preserved; and with the fact that the present building appearance is much different from the original architecture. Negotiations failed and the issue of controls and incentives was referred to the Hearing Examiner for recommendation to the Seattle City Council.

Conclusions

1. The Hearing Examiner may not recommend any control that is not set forth with adequate specificity or that is inconsistent with the Ordinance. Additionally, no control for which the reason or need is not established with respect to the specific features/characteristics of a

site may be recommended; neither use restrictions nor restrictions that prevent the owner from realizing a reasonable return on the site. Section 25.12.570, Seattle Municipal Code.

2. Neither the Ordinance constitutionality (separation of church and state; equal protection; unjust deprivation of property by the government) nor the designation is a proper subject of the Examiner's decision.

> On the basis of all the evidence presented, the *Hearing Examiner shall determine whether to recommend* all or any of the proposed *controls and incentives, and/or* whether to recommend *a modified version* of any of the proposed controls or incentives (emphasis added). Section 25.12.570, Seattle Municipal Code.

3. The control on the entire exterior of the building is adequately specific. It is reasonably clear that no exterior changes may be effected without Board approval, provisos excluded.

4. The effect of the controls is not to require a particular use. Although the building design was for a church, no provision restricts buildings erected as churches to church use. Preservation of the edifice does not require preservation of its existing use.

5. Nor do the additional administrative requirements for certain exterior alterations so hamper the structure that the building is limited to church use.

6. The remaining issue is whether the reason and need for the controls with respect to certain features of the site is established. While it could be urged that since the ultimate Designation criterion was spatial siting—and not architectural style, as originally recommended—controls on the exterior should be of a diminished concern. This suggestion, however, ignores the practical considerations and thrust of the ordinance. The exterior of the building contributes to its serving as "an easily identifiable visual

feature of its neighborhood." Therefore, although the architectural criterion was not final, the one selected generally supports the need for controls on the building exterior.

7. The entire building exterior, the "specific feature(s)" to be preserved, is prominently sited. Without controls, the specific feature could be destroyed or significantly altered such that the building-community nexus would be nonexistant.

8. However, the ordinance policy is to prevent the "unnecessary destruction or defacement of (such) cultural assets." Section 25.12.020, Seattle Municipal Code. We question whether the exterior changes necessitated by liturgy are tantamount to Ordinance envisioned "unnecessary destruction or defacement". Accordingly, the recommendation of the Hearing Examiner to the City Council is as follows:

Recommendation

To assure preservation of the specified features and characteristics of the above designated Seattle Landmark, a Certificate of Approval issued by the Landmarks Board must be obtained, or the time for denying a Certificate of Approval must have expired, before the owner may make alterations or significant changes to the exterior of the building where those changes would require application for a Building Permit, provided that all in kind maintenance and repair and changes necessitated by changes in liturgy of the above features and characteristics shall be excluded from the Certificate of Approval requirements.

Entered this 2nd day of July, 1981.

/s/ Leroy McCullough
LEROY MCCULLOUGH
Hearing Examiner

NOTICE OF RIGHT TO PETITION FOR FURTHER CONSIDERATION

Pursuant to 24.72.090, Seattle Municipal Code, Section 27.51 of the Zoning Ordinance 86300, as amended, any party affected by a recommendation of the Hearing Examiner may submit a petition in writing to the City Council requesting further consideration. The petition must be submitted within fourteen days after the date of mailing the recommendation of the Hearing Examiner and must be addressed to: City Council, Urban Development and Housing Committee, Municipal Building, Seattle, Washington 98104.

The petition should state clearly and concisely the reason(s) why further consideration is necessary, and should refer specifically to any errors alleged to exist in the Hearing Examiner's Findings and Conclusions. The City Council's consideration of the petition will be based upon the record of the Hearing Examiner's hearing, and new exhibits or other evidence in support of the petition should *not* be submitted. The Council, in its discretion, may allow oral or written arguments based on the record when it considers the petition.

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

No. 86-2-01179-0

FIRST COVENANT CHURCH OF SEATTLE, WASHINGTON,
a non-profit corporation,
Plaintiff,

vs.

THE CITY OF SEATTLE,
a Washington municipal corporation,
Defendant.

AFFIDAVIT IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT

STATE OF WASHINGTON)
) : ss.
COUNTY OF KING)

A. T. WENDELLS, being first duly sworn, deposes and says:

I am an attorney for the Plaintiff in this case, but I am making this affidavit on my personal knowledge. I have been a member of First Covenant Church for over 50 years, and I have been either Chairman or a member of the Board of Trustees through all except one year of the course of the Landmark preservation dispute with the City of Seattle. I have participated in all of the meetings, hearings, and correspondence involved in this matter.

This affidavit will be limited in its scope. The Church has several points of grievance with the City of Seattle involving the deficiencies of the Landmarks Preservation Ordinance, and the designation ordinance, the procedures

followed in this case, and the arbitrariness of the decision, but those will require a long involved trial. Facts involved in those matters are not presented in this affidavit. This motion and this affidavit raise only very basic questions concerning the constitutionality of the application of the Landmarks Preservation Ordinances to churches, and the lack of legislative intent to do so. We submit that those questions should be resolved first. Facts stated in this affidavit will be limited to those questions.

I will state as facts those allegations of the Complaint which are denied in the answer for want of information:

1. The First Covenant Church of Seattle, Washington is a Washington corporation incorporated under the provisions of RCW, Title 24, and it is in good standing with the Secretary of State of the State of Washington. The said Church is the owner and occupant of the church structure located at Pike and Bellevue in the city of Seattle, which is the subject of the Landmark designation herein complained of.

3. First Covenant Church is a religious organization. It is currently active with a full religious program. Its church structure at Pike and Bellevue is devoted solely to uses related to the religious program of the Church.

7. The effects of the designation of First Covenant Church as a Landmark will be:

> a. To limit the right and opportunity of First Covenant Church to make changes on the exterior of the building for the promotion of its religious mission without secular evaluation and approval by the City.

The procedural requirements of the Landmarks Preservation Ordinance were generally followed in the nomination and designation process, and the Church consistently objected and opposed the nomination and designation.

One step involved negotiation by the Landmark Preservation Board's staff for agreement on controls and

incentives. Incentives are defined in Ordinance No. 106348 as follows:

> 9. Economic incentives are such compensation, rights or privileges or combination thereof, which the Council, or other public body or agency, by virtue of applicable present or future legislation, may be authorized to grant to or obtain for the owner as consideration for the imposition of controls on a designated landmark site or landmark.

I attended the negotiation meeting with the Board's staff person, who plainly stated that no incentives would be offered or available since the City could not make any grants or special privileges to a church due to constitutional "establishment clause" prohibitions. No incentives have been offered, considered, or mentioned subsequent to the negotiation meeting.

The Church has no present plans for any modification of the exterior of the building. Its opposition to designation is based on the possibility that it may wish to make exterior alterations at some time in the future. It will do so for religious purposes to assist in accomplishing its religious missions. It considers that the requirement of approval by an administrative authority with architectural and aesthetic concerns, rather than religious concerns, is a violation of the Church's free exercise rights.

DATED this 25th day of August 1986.

/s/ A. T. Wendells
A. T. WENDELLS

SUBSCRIBED AND SWORN TO before me this 25th day of August, 1986.

/s/ Virginia L. Murphy
Notary Public in and for the
State of Washington,
residing at Seattle

(3)

No. 90-892

Supreme Court, U.S.
FILED
FEB 8 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1990

THE CITY OF SEATTLE,

Petitioner,

v.

FIRST COVENANT CHURCH OF SEATTLE, WASHINGTON,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Washington

RESPONDENT'S BRIEF IN OPPOSITION

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February 1991

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QUESTION PRESENTED BY RESPONDENT

The question presented by the Petitioner City (Pet. (i)) deals with the merits if a Writ of Certiorari is granted. Respondent presents another question which must be answered first:

> Should the Supreme Court of the United States issue a Writ of Certiorari to the Supreme Court of the State of Washington to review its decision positively stating that the ordinances involved were unconstitutional under the United States Constitution and the Washington Constitution?

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No. 90-892

In The

Supreme Court of the United States

October Term, 1990

THE CITY OF SEATTLE,

Petitioner,

v.

FIRST COVENANT CHURCH OF SEATTLE, WASHINGTON,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Washington

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

Another document of importance which could be classed as an opinion is the Washington Supreme Court's Mandate to the King County Superior Court, which is unreported and is reproduced at Respondent's Appendix, page 1.

JURISDICTION

Respondent does not question the general jurisdiction of the United States Supreme Court to issue writs of certiorari to the Washington Supreme Court, but respondent questions the jurisdiction in this case to review the state court's holding that the ordinances in question are unconstitutional under the Washington Constitution, and to review a decision that is now moot. (See discussion later)

CONSTITUTIONAL PROVISIONS AND ORDINANCES INVOLVED

In addition to the provisions and ordinances listed by Petitioner (Pet. 2), another constitutional provision is clearly involved:

> (a)bsolute freedom of conscience in all matters of religious . . . worship . . . shall be guaranteed to every individual. Washington Constitution, Art.1, § 11 (Amend. 34)

COUNTERSTATEMENT OF THE CASE

No case citations are necessary to support the proposition that the issuance or denial of a writ of certiorari by the United States Supreme Court is discretionary. 32A Am Jur 2d 116, § 585, Scope of Review. This Court can grant or deny certiorari for any of its own reasons, and the Court may find several to consider in this case, but over time there have developed some reasons for denial,

couched in terms of jurisdiction in some cases, which respondent seeks to have the Court consider:

I.

STATE LAW DECISION

Respondent submits that this case is one which should not be accepted for certiorari because it contains a decision of the law of the State of Washington by the Washington Supreme Court. The conclusion paragraph of the Opinion reads:

> We hold that the Seattle Landmarks Preservation Ordinance 106348 and Seattle Ordinance 112425 designating First Covenant Church a landmark violate the Church's First Amendment rights under the United States Constitution and Washington's Const. Art.1, § 11 (Amend. 34).

Taking the foregoing language for its clear and unambiguous meaning, it is obvious that the Washington Court has made its determination of unconstitutionality with respect to *both* the United States and Washington Constitutions. The citation to the Washington Constitution is specific and independent.

Petitioner seeks to consider this as only a Federal case, and attempts to lead this Court to that conclusion by the manner in which the Washington Court's holding (supra) is paraphrased:

> The majority then held that Seattle's two ordinances infringed respondent's First Amendment right to free exercise of religion. (Pet. 7)

That statement completely and intentionally eliminates the holding with respect to the Washington Constitutional provision as if it wasn't there. The petitioner does the same thing again by stating that the respondent Church "filed a motion for partial summary judgment contending, *inter alia*, that the ordinances violated the Free Exercise Clause of the First Amendment to the United States Constitution." (Pet. 6)

That statement again by paraphrase eliminates the State Constitution question, which question was presented to the Superior Court in the Church's August 25, 1986 motion documents as follows:

> Do the First Amendment to the U.S. Constitution and Article 1, Section 11, as amended, of the Washington Constitution prohibit the application of the City of Seattle's Landmark Preservation Ordinance to active churches?

To the first of the foregoing statements (Pet. 7) deleting references to the State Constitution, the Petitioner inserts a footnote (no. 5) stating a conclusion:

> The Washington Supreme Court referred twice to the freedom of religion provision of the Washington Constitution. See App. 8a; 18a. (Actually there were four such references (including App. 1a and 4a) in the majority opinion and one in the dissent). However, the court relied exclusively on its understanding of this Court's First Amendment free exercise jurisprudence in reaching its decision. (Pet. 7), citing *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983) (hereinafter referred to as the *Long* case).

Respondent disputes that conclusion. There is nothing to support exclusive reliance on Federal law. The court clearly indicated by its references that it was

making Washington law as well. The only inferences in the direction of reliance on Federal law to the exclusion of the State law are the majority opinion's use of citations to many Federal cases, and the procedural presumption rule of the *Long* case. The presumption is that if a state court cites Federal cases rather than State cases, it is making a decision based on Federal law only, because it feels compelled to follow that law instead of State law, as a result of which the case is subject to U.S. Supreme Court review.

Basic law is clear. The *Long* case cites it (Footnote 1, p. 1038):

> Where the judgment of a state court rests upon two grounds, one of which is Federal and the other non-Federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment.
>
> *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935).

The City's ordinances in question can be unconstitutional under both U.S. and Washington Constitutions. There may on some occasions be differences, which make a particular ordinance unconstitutional under one and not the other. The State of Washington law may lean more strongly toward protection of free exercise than Federal law. The question here is whether the Washington Court was making a decision of Washington law. If so, the Supreme Court has no jurisdiction.

Respondent's position is that the decision of State unconstitutionality was "independent and adequate". The *Long* procedural rule suffices in many cases to bridge a gap of uncertainty concerning the intention of a state

court, but the real inquiry is whether or not the state court was making an independent decision of and for state law, as well as an interpretation of Federal law.

The *Long* presumption can be offset by other evidence and factors. There is no question that Federal cases can be cited in State cases as persuasive precedents for State law. Long recognized that and suggested that any question about how the Federal cases were used be stated in the opinion. Unfortunately, no such statement was made in this case, but the writer of a State Supreme Court opinion would rarely be aware of that. Also, the *Long* case itself indicates that there may be circumstances where clarification might be necessary, despite the *Long* presumption (Footnote 6, p. 1041).

There are several indicators in the record of this case which show that the Washington Court was making an independent decision of Washington law construing the Washington Constitution:

a. The original complaint in this case, reproduced at Respondent's Appendix, p. 3, pleaded only the Washington Constitution, not the U.S. Constitution. It has never been amended.

b. The use of Federal cases started early in the development of this case, basically for lack of Washington authorities. In the City's first attack by Motion for Summary Judgment, it cited cases from the U.S. Supreme Court for its ripeness defense (See App. 6a), and both sides have used Federal cases as precedent ever since. That did not convert the case to a Federal case exclusively.

c. One reason for the use of Federal cases in the Court's opinion was the lack of pertinent

authority in Washington. That was obviously in the mind of the majority opinion writer who opened the opinion: "This is a case of first impression (App. 1a)".

d. The court did use Washington cases when it found them. In the first portion of the majority opinion (App. 4a-6a), concerning justiciable controversy, the Court cited 4 Washington cases. In the balance of the majority opinion concerning constitutionality 2 Washington cases were cited, and a Washington case the respondent relied on, *Sumner v. First Baptist Church*, 97 Wn2d. 1, 639 P.2d 1355 (1982) was cited, discussed, and considered controlling in the concurring opinion. (App. 22a-25a). There are no other Washington cases from which the court could have built the theories deciding the case. Federal cases are used, but that does not mean that the Court considered itself "compelled" by those cases. Even the *Long* case recognizes the use of Federal cases as precedent in the same way that precedent from all foreign jurisdiction are used. *Michigan v. Long*, 463 U.S. 1032, 1041. We submit that that is the way the Federal citations are used in this case.

e. Finally, while the State Supreme Court was still considering the Petitioner City's Petition for Reconsideration, the City made a Motion for Stay of Mandate "until the City secures a decision by the United States Supreme Court," claiming the potential of irreparable damage to churches. Upon denial of reconsideration, the Court required the Church to respond to the Motion to Stay. It did so, citing, *inter alia*, the following Washington cases and concluding:

Tukwila v. Nalder, 53 Wn.App. 739, 770 P.2d 659 (1989), at pp. 749-750:

Thus, while interpretation of the parallel federal constitutional provisions may provide guidance in interpreting our own, we must ultimately rely on the hierarchy of values and principles that have been developed under the Washington Constitution.

Seattle v. Mesiani, 110 Wn.2d 454, 755 P.2d 775 (1988), at p. 456:

[1] When parties allege violation of rights under both the United States and Washington Constitutions, this court will first independently interpret and apply the Washington Constitution in order, among other concerns, to develop a body of independent jurisprudence, and because consideration of the United States Constitution first would be premature.

Pasco v. Mace, 98 Wn.2d 87, 653 P.2d 618 (1982), at pp. 96-97:

However, the state courts are at liberty to find within the provisions of their own constitutions a greater protection than is afforded under the federal constitution, as interpreted by the United States Supreme Court. *Oregon v. Hass*, 420 U.S. 1714, 1719, 43 L.Ed.2d 570, 95 S.Ct. 1215 (1975); *State v. Fain*, 94 Wn.2d 387, 617 P.2d 720 (1980); *State v. White*, 97 Wn.2d 92, 640 P.2d 1061 (1982).

Insofar as the Washington Constitution is concerned, *the case has been decided.* The landmark ordinances in question are unconstitutional as to churches. That decision will not change, no matter what the

> U.S. Supreme Court says. There is no reason to delay the mandate. It should issue immediately. (End of quotation)

The Motion for Stay was denied by Order dated October 17, 1990, copy reproduced as Respondent's Appendix, p. 8. That action certainly supports the proposition that the Washington Supreme Court was acting independently in regard to its application of the Washington Constitution.

The following quotation from 32A Am Jur 2d 167 § 670, is pertinent here:

> *It is well accepted that the Supreme Court of the United States will not review a decision of a state court resting upon adequate and independent non-federal grounds.* This rule is applied whether a case is brought to the Supreme Court by means of appeal or certiorari.
>
> The rule that the Supreme Court has no jurisdiction to review a case *if the judgment is supported by adequate state ground is based on the observation that the adequate state ground controls the result in the case, no matter what the Supreme Court may say about the merits of the federal issue. In such a case, anything which the Supreme Court could say on the federal issue would only be an advisory opinion.* And the Supreme Court has said that it does not have jurisdiction to render an advisory opinion under such circumstances, or to correct statements in state court opinions which do not affect the final outcome of a case, even though a state court's opinion may reflect an erroneous view of federal law.
>
> (Numerous footnote citations)
>
> (Emphasis ours)

Concluding the State Law Decision portion of this brief, respondent submits that the State Supreme Court has made an adequate and independent decision concerning the unconstitutionality of the questioned ordinances under Washington law, the *Long* procedural presumption notwithstanding. Therefore, this court should deny certiorari.

An opposite opinion to the foregoing by the Supreme Court would only determine that the Supreme Court has jurisdiction to grant certiorari, but it would not compel certiorari. The Court could still deny it for whatever reason it wishes.

II.

MOOTNESS

Following the denial of the Petitioner's Motion to Stay (Resp. App. 8); the Washington Supreme Court on October 19, 1990, issued its Mandate to the King County Superior Court, copy reproduced as Respondent's Appendix, p. 1. Pursuant to that Mandate, the Declaratory Judgment of the King County Superior Court declaring the two ordinances void as to First Covenant Church was entered on November 9, 1990, copy reproduced as Respondent's Appendix, p. 9. No appeal has been taken from the Judgment.

Insofar as the First Covenant Church case is concerned, the Superior Court's final decree has been entered. The case is over. There is nothing pending in that court at all. First Covenant Church is no longer a landmark. Nothing can change that since the judgment was

entered pursuant to the Washington Supreme Court's decision and mandate under the Washington Constitution.

The effect of mootness is described at 32A Am Jur 2d 823, § 331, as follows:

> A federal appellate court has no power to determine the merits of a question which has become moot. This prohibition is based on the requirement of Article III of the Constitution, which provides that the judicial power of the United States shall extend only to cases and controversies. Consequently, *a federal appellate court cannot decide a moot question, because a decision on a moot question constitutes an advisory opinion,* given in an abstract context, which cannot affect the rights of the litigants in the case before the court. Instead, review is only permitted where the judgment of the appellate court will have some material effect, will resolve a real and substantial controversy between adverse parties, and will result in the granting of relief.
>
> (Footnoting numerous cases)
>
> (Emphasis ours)

III.

HANDICAP TO REVIEW

One of the handicaps to an effective review of this case, that the respondent can foresee, is that there has been no trial for the establishment of facts. The only facts in the record, which are very few, were produced by affidavit for Summary Judgment arguments. The Petitioner prevented a trial by its Motions for Summary Judgment.

IV.

MISCELLANEOUS

1. *Scope of Brief.* After taking the position that this was only a Federal case, and citing the *Long* case (Pet. 7), the Petitioner continues briefing by citing cases opposing the Washington Court's holding of unconstitutionality. That would be the matter before the Court if certiorari is granted, fully briefed and argued then. Respondent will not attempt to answer that portion in this Brief.

2. *The St. Bart. Case.* This is one exception to the last preceding paragraph. The petitioner relies heavily on *St. Bartholemew's Church v. City of New York*, 914 F.2d 348 (2d Cir. 1990). (Pet. 10, 11, 12, 14, 16). A careful reading of that case shows how intimately and intrusively the Landmarks Board, experts, Courts, and witnesses probed into the detailed affairs of the Church in a landmark case. It is the best example of why landmark legislation should not apply to churches.

3. *The Society of Jesus Case.* In footnote 11 at Pet. 17, the case of *Society of Jesus in New England v. Boston Landmarks Comm'n.*, S.J.C. No. S-5414, was shown to have similar issues pending. Since that entry, the case has been decided. The landmark designation of the interior of the church was declared to be unconstitutional under Massachusetts law. The reasoning is remarkably similar to that in the First Covenant Church opinion, including the following:

> The government interest in historic preservation, though worthy, is not sufficiently compelling to justify restraints on the free exercise of religion, a right of primary importance. In short,

under our hierarchy of constitutional values we must accept the possible loss of historically significant elements of the interior of this church as the price of safeguarding the right of religious freedom.

CONCLUSION

For the foregoing reasons, and any others the Court may consider, respondent urges the Court to deny the petition for a writ of certiorari.

Respectfully submitted,

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RESPONDENT'S APPENDIX

THE SUPREME COURT OF WASHINGTON

FIRST COVENANT CHURCH OF SEATTLE, WASHINGTON, Appellant, v. THE CITY OF SEATTLE, Respondent.	MANDATE No. 56377-2 King County No. 862011790

THE STATE OF WASHINGTON TO: The Superior Court of the State of Washington in and for King County.

This is to certify that the opinion of the Supreme Court of the State of Washington filed on March 22, 1990, became the decision terminating review of this court in the above entitled cause on October 17, 1990. This cause is mandated to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to Rule of Appellate Procedure 14.3, costs are taxed as follows: Costs will be taxed by Supplemental Judgment.

(SEAL)

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 19th day of October, 1990.

/s/ C. J. Merritt
C. J. MERRITT
Clerk of the Supreme Court,
State of Washington

cc: Mr. Gordon Clinton
Mr. Arthur Wendells
Hon. Mark Sidran
Mr. Robert Tobin, Asst.
Reporter of Decisions

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

FIRST COVENANT CHURCH OF SEATTLE, WASHINGTON, a non-profit corporation, Plaintiff, v. THE CITY OF SEATTLE, a Washington municipal corporation, Defendant.	NO. 86-2-01179-0 COMPLAINT FOR DECLARATORY JUDGMENT

JURISDICTIONAL ALLEGATIONS

1. The First Covenant Church of Seattle, Washington, is a Washington corporation incorporated under the provisions of RCW, Title 24, and it is in good standing with the Secretary of State of the State of Washington. The said church is the owner and occupant of the church structure located at Pike and Bellevue in the city of Seattle, which is the subject of the Landmark designation herein complained of.

2. The Defendant, The City of Seattle, is a Washington municipal corporation having legislative powers and duties as prescribed by the laws of the State of Washington. The City of Seattle is located within King County, Washington.

FACTUAL ALLEGATIONS

3. First Covenant Church is a religious organization. It is currently active with a full religious program. Its

church structure at Pike and Bellevue is devoted solely to uses related to the religious program of the Church.

4. The City of Seattle has adopted Ordinance No. 106348, the Seattle Landmarks Preservation Ordinance, copy of which is attached as Exhibit A.

5. Under purported authority of said Ordinance, the church structure owned by the Plaintiff, First Covenant Church, was nominated as a Landmark. The Church opposed the nomination through the procedural provisions prescribed by the Ordinance up through a Hearing Officer's Findings and Recommendation, and to Appeal thereof to the City Council.

6. On September 9, 1985, the City Council denied the Appeal of First Covenant Church, by the adoption of Ordinance No. 112425, copy of which is attached as Exhibit B, the result of which was to impose controls on the use of the property of First Covenant Church as prescribed in section 2 thereof.

7. The effects of the designation of First Covenant Church as a Landmark will be:

a. To limit the right and opportunity of First Covenant Church to make changes on the exterior of the building for the promotion of its religious mission without secular evaluation and approval by the city.

b. To severely limit the market for the building to only those who can use a church structure, in the event that First Covenant Church at any time should decide to sell.

c. To substantially reduce the market value of the property in the event the church should wish to sell.

CONSTITUTIONAL QUESTIONS

8. Application of the city's Landmark Preservation Ordinance to First Covenant Church is unconstitutional in that it violates the religious freedom provisions of Amendment 34 to the Constitution of the State of Washington.

9. Application of the city's Landmark Preservation Ordinance to First Covenant Church is unconstitutional in that it violates the equal privileges provisions of Article I, section 12, of the Constitution of the State of Washington. The said Ordinance provides for "incentives" as consideration for the imposition of controls. Incentives cannot be granted to churches in the same manner as they can to other types of buildings and owners. No incentives were granted to the Plaintiff.

10. Application of the city's Landmark Preservation Ordinance to First Covenant Church is unconstitutional as a violation of the provisions of Amendment 9 to the Constitution of the State of Washington prohibiting the taking of private property for public use without just compensation.

ORDINANCE CONSTRUCTION

11. By reading the Ordinance as a whole, and Section 9.05 in particular, the only reasonable construction is that the Ordinance was not intended to apply to a church. To so apply it, is contrary to the language and meaning of the Ordinance.

12. The designation of First Covenant Church as a Landmark was based on the criterion set forth as Section 3.01 (6) of the ordinance reading as follows:

Because of its prominence of spatial location, contrasts of siting, age, or scale, it is an easily identifiable visual feature of its neighborhood or the city and contributes to the distinctive quality or identity of such neighborhood or the city; Said criterion is ambiguous and so vague that designation pursuant thereto is a totally arbitrary function, contrary to standards required of ordinances affecting property rights.

ARBITRARY ACTION

13. The action of the City Council of the City of Seattle in approving the designation of First Covenant Church as a Landmark and imposing the controls as hereinbefore set forth was arbitrary and capricious, contrary to the City Council's own Ordinance No. 106348, contrary to the procedural provisions of said Ordinance, without due process, and contrary to law.

14. The action of the City Council in imposing controls in the form heretoforth dated has been arbitrary and capricious, in that the stated control exempting "changes in liturgy" creates a new ambiquity [sic] calling for arbitrary action in the future.

Wherefore, Plaintiff prays for judgment declaring:

a. That the application of City of Seattle Ordinance No. 106348 to churches is unconstitutional under the Constitution of the State of Washington; and

b. That the action of the Seattle City Council in declaring the structures of First Covenant Church of Seattle to be a Landmark is void.

c. That the Plaintiff have its costs and disbursements to be taxed, including reasonable attorney's fees.

DATED this 21st day of January, 1986.

WENDELLS, FROELICH, POWER & LAKEFISH

By /s/ A. T. Wendells
A. T. Wendells

CLINTON, FLECK AND GLEIN

By /s/ Gordon S. Clinton
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Attorneys for Plaintiff

THE SUPREME COURT OF WASHINGTON

FIRST COVENANT CHURCH OF SEATTLE, WASHINGTON, Appellant, v. THE CITY OF SEATTLE, Respondent.	NO. 56377-2 ORDER DENYING RESPONDENT'S MOTION FOR STAY OF MANDATE

Respondent's MOTION FOR STAY OF MANDATE and Appellant's RESPONSE to the motion were considered by the Chief Justice.

Now, therefore, it is hereby

ORDERED:

The MOTION FOR STAY OF MANDATE is denied.

DATED at Olympia, Washington this 17th day of October, 1990.

/s/ Keith M. Callow
CHIEF JUSTICE

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

FIRST COVENANT CHURCH OF SEATTLE, WASHINGTON, a non-profit corporation, Plaintiff, vs. THE CITY OF SEATTLE, a Washington municipal corporation, Defendant.	NO. 86-2-01179-0 DECLARATORY JUDGMENT

This matter having come on regularly before the undersigned upon the Motion of the Plaintiff for Entry of Judgment Pursuant to Washington Supreme Court Mandate, counsel for the Plaintiff and the Defendant City of Seattle being present, and the court having examined the files and records herein, together with the Mandate and opinion of the Supreme Court of the State of Washington, now therefore:

It is hereby Declared, Adjudged, and Decreed that the application of City of Seattle Ordinance Number 106348, the Seattle Landmarks Preservation Ordinance, to First Covenant Church is unconstitutional under the First Amendment of the United States Constitution and Article 1, Section 11 (Amend. 34) of the Washington Constitution; and

It is further Declared, Adjudged, and Decreed that City of Seattle Ordinance Number 112425 designating First Covenant Church as a Landmark and imposing controls is unconstitutional and void; and

It is hereby Adjudged and Decreed that Plaintiff have its costs and disbursements to be taxed.

Done in open court this 9th day of November, 1990.

/s/ Nancy Ann Holman
JUDGE
JUDGE NANCY ANN HOLMAN

Presented by:

/s/ A. T. Wendells
A. T. Wendells
of Attorneys for Plaintiff

Copy Received and
Notice of Presentation
Waived.

MARK H. SIDRAN
Seattle City Attorney

By /s/ Robert D. Tobin
Robert D. Tobin
Assistant City Attorney

Supreme Court, U.S.
FILED
FEB 20 1991
THE CLERK

No. 90-892

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

THE CITY OF SEATTLE,
Petitioner,

v.

FIRST COVENANT CHURCH OF SEATTLE, WASHINGTON,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

REPLY BRIEF OF PETITIONER

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February 1991

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-892

THE CITY OF SEATTLE,

Petitioner,

v.

FIRST COVENANT CHURCH OF SEATTLE, WASHINGTON,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

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REPLY BRIEF OF PETITIONER

In our petition, we showed that the decision of the Supreme Court of Washington directly conflicts with the Second Circuit's decision in *St. Bartholomew's Church v. City of New York*, 914 F.2d 348 (2d Cir. 1990), *petition for cert. filed*, 59 U.S.L.W. 3433 (U.S. Dec. 18, 1990) (No. 90-900), and is altogether inconsistent with this Court's decisions interpreting the Free Exercise Clause of the First Amendment. We also showed that this case presents an important constitutional issue: whether the exteriors of church buildings must be exempted from the application of preservation legislation of a kind that has been adopted by all 50 states and hundreds of municipalities.[1]

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[1] *See also* Motion for Leave to File and Brief of the National Trust for Historic Preservation as *Amicus Curiae* in Support of the Petitioner City of Seattle, Brief at 2-3, 8-9 (filed Feb. 8, 1991) (noting the increase in the number of historic preservation laws).

Since our petition was filed, the religious organization involved in the *St. Bartholomew's* case has also filed a petition for a writ of certiorari, noting the conflict between the decision in that case and the decision in this one. Petition for a Writ of Certiorari at 7-8, *St. Bartholomew's Church v. City of New York*, No. 90-900 (filed Dec. 10, 1990); Reply Brief in Support of Petition for a Writ of Certiorari at 1-2 (filed Feb. 11, 1991). But while the two decisions are indeed in direct conflict, the specific issue in *St. Bartholomew's* is a narrower one that would not arise at all if the decision of the Washington Supreme Court in *this* case were correct. The decision in this case wholly exempts buildings owned by religious organizations from designation and protection as landmarks, on the ground that the mere possibility of having to submit plans to alter designated features of landmarked buildings to secular review is an excessive burden upon the exercise of religion. If that were the law, the review process and the outcome challenged in *St. Bartholomew's* could never have occurred.

Respondent's brief in opposition in this case concedes the conflict with *St. Bartholomew's*, makes no response to our showing of inconsistency with this Court's First Amendment decisions, and implicitly concedes that the issue in this case is one of substantial importance. Instead of responding to the points urged in the petition, respondent asserts two barriers to review, both of which lack merit.

First, respondent argues that the Washington Supreme Court rested its decision on an adequate and independent state ground. This argument violently misconstrues *Michigan v. Long*, 463 U.S. 1032 (1983), which is on point and dispositive. Here, almost exactly as in *Long*, the state court analyzed only the federal constitutional provision and cited only case discussion of federal law

and then,[2] in a conclusory sentence plus other incidental references, cited a provision of the state constitution along with the federal constitutional provision without explaining the significance of the state provision. *Long* squarely holds that this kind of unexplained parallel invocation of a state constitutional provision, in the course of an opinion that in all other respects appears to turn on federal law, does not establish an adequate and independent state ground for decision.

> [W]hen, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.

Id. at 1040-41. This Court has repeatedly reconfirmed its holding in *Long*.[3] Respondent's discussion of pre-*Long* decisions, its citations to its own brief on a motion for stay that was denied without explanation, its invocation of the absence of state law on point, and its references to the state court's citation of state cases to resolve a different issue in the case are irrelevant.[4]

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[2] Respondent emphasizes that two state *court* cases were cited in the opinions below, but both citations were for points of federal law. As we noted in the petition, *Witters v. State Comm'n for the Blind*, 112 Wash. 2d 363, 371, 771 P.2d 1119, 1122-23, *cert. denied*, 110 S. Ct. 147 (1989), was cited below for its analysis of this Court's free exercise decisions. App. 9a; *see* Petition at 7 n.5. *City of Sumner v. First Baptist Church of Sumner*, 97 Wash. 2d 1, 639 P.2d 1358 (1982) (en banc), cited in the concurring opinion below, rested solely on the state court's interpretation of the First Amendment. App. 22a-23a; *see* Respondent's Br. at 7.

[3] *See, e.g., Illinois v. Rodriguez*, 110 S. Ct. 2793, 2798 (1990); *Milkovich v. Lorain Journal Co.*, 110 S. Ct. 2695, 2701-02 n.5 (1990); *Pennsylvania v. Muniz*, 110 S. Ct. 2638, 2643 n.4 (1990).

[4] In fact, the Washington Supreme Court has made it clear, and reiterated in *State v. Motherwell*, 114 Wash. 2d 353, 368, 788 P.2d

Second, respondent suggests that this case is "moot" because the Washington Supreme Court has issued its mandate pursuant to which the trial court has issued a final judgment. There is no question of mootness here: the controversy between the City of Seattle and First Covenant Church, over whether the First Amendment forbids the City's effort to preserve historic church buildings, is alive and concrete, and this Court could resolve that controversy differently than the Washington Supreme Court has done. Respondent's real argument is not that the case is moot but that the state court decision has been immunized from review because the trial court entered its judgment before this Court could rule on a petition for a writ of certiorari. Respondent's Br. at 10-11. That remarkable proposition (which would force this Court to stay state court decisions to preserve its own jurisdiction even where the entry of a state judgment has no immediate practical consequences) is quite wrong:

> The issuance of the lower court's mandate . . . does not destroy the power of the Supreme Court to

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1066, 1074 (March 22, 1990) (en banc), a Free Exercise Clause case decided the same day as the present case, that where a claim is made under parallel federal and state constitutional provisions the court will examine the federal claim first and "will consider whether to apply our state constitutional provisions more strictly than parallel federal provisions only if we are asked to do so . . . and even then only if the argument includes proper analysis of the six 'interpretive principles' outlined in *State v. Gunwall*, 106 Wash. 2d 54, 720 P.2d 808 (1986)." In *Gunwall*, the court had said, "[r]ecourse to our state constitution as an independent source [from the federal Constitution] for recognizing and protecting the individual rights of our citizens must spring not from pure intuition, but from a process that is at once articulable, reasonable and reasoned." 106 Wash. 2d at 63, 720 P.2d at 813 (footnote omitted). No such specific request, or analysis of the six principles, or reasoning was offered to the state courts in this case; nor was any such analysis presented in the brief in opposition. There is no reason to believe that the court below accorded any independent significance to the state constitutional provision.

> review the lower court's judgment. *Carr v. Zaja*, 283 U.S. 52, 53 (1931); *Aetna Casualty Co. v. Flowers*, 330 U.S. 464, 467 (1947); and see *Louisville & N.R. Co. v. Behlmar*, 169 U.S. 644, 648 (1898). Nor will the Court be prevented from reviewing and reversing the decision below if the lower court judgment is obeyed, unless the nature of the case is such that reversal by the Supreme Court could then have no effect.

R. STERN, E. GRESSMAN & S. SHAPIRO, SUPREME COURT PRACTICE § 17.10, at 674 (6th ed. 1986).

Finally, we note that since the filing of the petition, the Supreme Judicial Court of Massachusetts has decided *Society of Jesus of New England v. Boston Landmarks Comm'n*, 409 Mass. 38, 564 N.E.2d 571 (1990). The court there held that the designation of the *interior* of a church as a landmark violated the Massachusetts Constitution. The court specifically noted that the case did not involve landmark designation of a church's *exterior*, *id.* at 572 n.2, and distinguished its earlier advisory opinion that the designation of a church exterior is unobjectionable, *id.* at 73 (citing *Opinion of the Justices to the Senate*, 333 Mass. 783, 128 N.E.2d 563, 568 (1955)).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 1991

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No. 90-892

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THE CITY OF SEATTLE,

Petitioner,

v.

FIRST COVENANT CHURCH OF SEATTLE, WASHINGTON,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

MOTION FOR LEAVE TO FILE AND BRIEF OF THE NATIONAL TRUST FOR HISTORIC PRESERVATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER CITY OF SEATTLE

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February 8, 1991

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27

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-892

THE CITY OF SEATTLE,

Petitioner,

v.

FIRST COVENANT CHURCH OF SEATTLE, WASHINGTON,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF OF THE NATIONAL TRUST FOR HISTORIC PRESERVATION IN SUPPORT OF THE PETITIONER CITY OF SEATTLE

Pursuant to Rule 36.1, the National Trust for Historic Preservation in the United States ("National Trust") respectfully moves for leave to file the attached brief as *amicus curiae* in support of the City of Seattle's Petition for a Writ of Certiorari to the Washington Supreme Court in this case. The City of Seattle has consented to the filing of the brief, as evidenced by the letter filed with the Clerk of this Court. However, Respondent First Covenant Church has not consented.

The National Trust is the leading national organization in the field of historic preservation. It was chartered by Congress in 1949 as a private, charitable, educational, and nonprofit corporation to "facilitate public participation in the preservation of sites, buildings and objects of national significance or interest" and to preserve and administer properties "significant in American history and culture." 16 U.S.C. § 468. In deciding to charter the National Trust, Congress intended that "[the National Trust] will mobilize and coordinate public interest and participation in the preservation and interpretation of sites and buildings from voluntary resources." S. Rep. No. 1110, 81st Cong., 1st Sess. 4 (1949), *reprinted in* 1949 U.S. Code Cong. & Ad. News 2285, 2288. It is in the spirit of this charter that the National Trust seeks to express its views in this case.

The National Trust has more than 230,000 individual contributing members nationwide, and approximately 3,000 member organizations involved in local and regional historic preservation activities. These members have a substantial interest in upholding and enhancing the effectiveness of local historic preservation laws. In addition to owning and maintaining historic properties, the National Trust furthers historic preservation by providing extensive advisory and technical services to local governments that have enacted landmark and historic district ordinances. The National Trust has worked closely with many of the more than 1,700 municipalities that have enacted such ordinances.

The National Trust's expertise on historic preservation law is nationally recognized, particularly with respect to the constitutional validity of local historic

preservation ordinances.[1] The National Trust has thus examined the issues presented in this case from a national perspective. It believes that historic preservation contributes fundamentally to the welfare and the vitality of this nation and that the decision in this case will have a significant impact on the regulatory authority of local governments to protect historic religious properties. The National Trust is concerned that wholesale exemptions from landmark designation for any category of historic properties, as distinct from case-by-case requests for relief in order to make specific changes in designated features of the property, will undermine the integrity of historic preservation laws without valid justification.

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[1] The National Trust participated as *amicus curiae* in this case before the Washington Supreme Court in support of the City of Seattle's motion for reconsideration. The National Trust also participated as *amicus curiae* in *Rector, Wardens, and Members of the Vestry of St. Bartholomew's Church v. City of New York*, 914 F.2d 348 (2d Cir. 1990), *petition for cert. filed*, 59 U.S.L.W. 3433 (U.S. Dec. 10, 1990) (Nos. 90-899, 90-900), and *Society of Jesus v. Boston Landmarks Comm'n*, No. SJC No. 5415 (Mass. Dec. 31, 1990), which involve the applicability of preservation laws to religious properties. The National Trust is also a plaintiff in *Alger, et al. v. City of Chicago*, No. 90 C 2778 (N.D. Ill. Sept. 19, 1990), *appeal docketed*, No. 91-1029 (7th Cir., filed Jan. 3, 1991), which involves a constitutional challenge to a local ordinance exempting religious properties from landmark designation.

The National Trust has also participated as *amicus curiae* in the following cases before this Court involving local government land use regulatory authority: *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987); *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340 (1986); *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

For the reasons stated above, the National Trust respectfully requests that this Court grant its motion to file the attached *amicus curiae* brief in support of the petition for a writ of certiorari filed by the City of Seattle in this case.

Respectfully submitted,

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February 8, 1991

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-892

THE CITY OF SEATTLE,

Petitioner,

v.

FIRST COVENANT CHURCH OF SEATTLE, WASHINGTON,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

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AMICUS CURIAE BRIEF OF THE NATIONAL TRUST FOR HISTORIC PRESERVATION IN SUPPORT OF THE PETITIONER CITY OF SEATTLE

INTEREST OF *AMICUS CURIAE*

The National Trust for Historic Preservation in the United States ("the National Trust") was chartered by Congress in 1949 as a private charitable, educational, and nonprofit corporation to "facilitate public participation in the preservation of sites, buildings and objects of national significance or interest" and to preserve and administer properties "significant in American history and culture." 16 U.S.C. § 468. The National Trust has more than 230,000 individual

members nationwide, and approximately 3,000 member organizations involved in local and regional historic preservation activities. In addition to owning and maintaining historic properties, the National Trust furthers historic preservation by providing extensive advisory and technical services to local governments that have enacted landmark and historic preservation ordinances.

STATEMENT

A. Introduction

While Americans have always treasured their history and traditions, it is only in the past 60 years that local, state, and federal laws have been expanded to protect our physical heritage—the nation's historic buildings, places, and neighborhoods. In the 1930s, the cities of Charleston, South Carolina and New Orleans, Louisiana adopted the first local historic preservation ordinances in the United States. By the 1960s, the threat of wholesale destruction of historic neighborhoods by urban renewal projects and highways had engendered a broad national historic preservation movement, and led to the adoption of the National Historic Preservation Act, 16 U.S.C. § 470 *et seq.*, and the enactment of state and local historic preservation laws across the country.

By 1978, when this Court issued its landmark opinion in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 107 (1978), all 50 states and more than 500 local communities had enacted historic preservation laws; today that number has grown to more than 1,700.[1] *Penn Central* laid to rest any doubts

[1] *See infra* note 6.

about the constitutionality of the local regulation of historic landmarks, which enhance the quality of life for all. The decision of the Washington Supreme Court in this case presents a serious threat to these widespread local preservation efforts, by creating a wholesale exemption from the protections that would otherwise be afforded for historic properties owned by religious institutions.

Religious properties often have historic, community, and architectural significance that makes them particularly worthy of preservation. According to the National Park Service, 5,524 religious properties are listed in the National Register of Historic Places.[2] But this number tells only part of the story. In cities and towns across the country, churches and other religious buildings are often literal landmarks—giving residents and visitors a sense of the fabric of community life. Religious buildings often dominate the streetscapes and skylines, adding beauty and inspiration to many towns and neighborhoods. Religious buildings act as anchors in their communities, providing, in addition to their religious and spiritual missions, outreach to broad segments of the public for cultural enrichment, social services, and a variety of private sector activities.

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[2] Statistics provided on January 14, 1991, by Jon Byrn, Data Base Manager, U.S. Department of the Interior, Keeper of the National Register. Unlike the protections afforded by local landmark ordinances such as Seattle's, National Register listing provides protection only with respect to the actions of federal agencies, such as federally-funded highways or urban renewal projects, and non-federal activities that are regulated by federal licenses or permits. *See* National Historic Preservation Act, 16 U.S.C. §§ 470f, 470h-2.

Religious buildings also have played an important role in the history of our nation, from Boston's Old North Church, which signalled Paul Revere to start his historic ride, to the Ebenezer Baptist Church in Atlanta, where Rev. Martin Luther King, Jr. developed the moral precepts of the civil rights movement in the 1960s. More than perhaps any other category of buildings, religious properties are a vital component of our physical and social environment from coast to coast, from Park Avenue to Main Street.

B. Regulatory Framework

The Seattle Landmarks Preservation Ordinance creates a three-step process for protecting historic sites in Seattle. The first step is the nomination and review of a site for designation as a landmark. The designation decision is made by an expert agency—the Landmarks Preservation Board—based on specific criteria of historic or architectural significance, after a public nominating meeting and a public hearing on the designation. Seattle Mun. Code §§ 25.12.350-25.12.480 (App. 53a-59a).

The second step is to develop appropriate controls and incentives to preserve the significant features of the landmark. This is done by agreement with the owner where possible; otherwise upon the recommendation of a hearing examiner. These controls are then codified in a designating ordinance, which must be approved by the City Council. *Id.* §§ 25.12.490-12.25.660 (App. 59a-67a). The designating ordinance specifies the features of the landmark that will require the approval of the Landmarks Preservation Board prior to making any significant changes. *Id.* §§ 25.12.500-25.12.630 (App. 60a-66a). The ordinance specifically provides that in no event may the des-

ignation deprive the owner of a reasonable economic use of the property. *Id.* § 25.12.580 (App. 63a-64a).

The third step in the process comes into play if the property owner wishes to make changes in the protected features of the property. In order to do so, the owner must apply for a certificate of approval from the Seattle Landmarks Commission. *Id.* § 25.12.670 (App. 68a). An application for a certificate of approval is evaluated based on a number of factors, including the economic consequences of denying the certificate, the extent to which other alternatives are available to achieve the owner's objectives, and the extent to which the proposed alteration may be necessary to meet the requirements of another law. *Id.* § 25.12.750 (App. 71a-72a).

Virtually all preservation ordinances, including Seattle's, allow exceptions based on the particular circumstances of an individual property owner, but such exceptions are only allowed on a case-by-case basis, in the context of evaluating a concrete proposal to make changes in the landmarked property or to accommodate the specific needs of the property owner.[3] In fact, conflicts between the interests of property

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[3] The National Trust is aware of only one preservation ordinance that categorically exempts historic religious properties from landmark designation. The City of Chicago has enacted a broad exemption for religious properties from its landmarks ordinance. *See* Chicago Mun. Code § 21-69.1. This legislative exemption is currently being challenged as violative of the first amendment's establishment clause. *See Alger v. City of Chicago*, No. 90 C 2778 (N.D. Ill. Sept. 19, 1990), *appeal docketed*, No. 91-1029 (7th Cir., filed Jan. 3, 1991) (district court dismissed plaintiffs' claim on grounds that alleged harm to church was not yet imminent and therefore plaintiffs did not yet have standing).

owners and the goals of historic preservation are the exception rather than the rule. The primary objective of most landmark ordinances, including Seattle's, is to provide an administrative review process that facilitates dialogue and negotiation between the property owner and preservation experts, in order to assist the property owner in making sure that proposed alterations or changes in the property do not inadvertently or unnecessarily harm significant features of the property.

C. First Covenant's Challenge

This case well illustrates the problems of creating wholesale exemptions from preservation ordinances at the landmark designation stage. First Covenant Church has never alleged that it has any plans either to renovate, alter, or demolish its building, or to take any other action that would be regulated by the Seattle Landmarks Preservation Ordinance. The Church brought this case on the ground (among others) that the landmark designation of the exterior of its building, alone, substantially burdened its right to free exercise of religion. The Washington Supreme Court agreed, concluding that the "aesthetic and community values associated with landmark preservation" were "clearly outweighed" by the burden on the Church's free exercise rights. (App. 17a).

Significantly, the Church did not allege that the landmark designation had any impact—even a potential future impact—on its practice of religion. Rather, it alleged burdens of the sort that any property owner might encounter in connection with land use regulation: the burden that some future alteration proposal might require secular review; the burden, in connection with such a proposal, of paperwork, negotiations,

and hearings; and the burden of "uncertainty" as to whether approval of the proposal would be granted. (App. 5a)

Based on these asserted burdens, and essentially on the ground that a religious organization should not have to interact with secular authorities except on secular matters of compelling importance, the Washington Supreme Court effectively exempted buildings owned by religious institutions from landmark designation, without regard to any actual hardship or interference with the practice of religion. This religious exemption warrants review by this Court.

ARGUMENT

I. This Case Presents an Important Question Concerning the Authority of Local Governments to Protect Historic Properties Through Landmark Designation and Controls.

A. The Landmark Designation of Historic Buildings, Including Historic Religious Properties, Serves an Important Public Purpose.

The importance of preserving America's architectural and historic resources through the enactment of historic preservation laws has received increasing recognition during the last half-century. Beginning with our nation's first preservation ordinance, adopted by the City of Charleston, South Carolina, in 1931, state and local governments around the country have adopted laws that provide for the designation and protection of buildings, sites, and districts that embody exceptional architecture or make a significant contribution to our local, state, or national heritage.

On the local level, historic preservation is now a well-established and rapidly growing form of land use

regulation. This is evidenced by the dramatic increase in the number of communities that have adopted some form of historic preservation ordinance, rising from approximately 500 in 1978[4] to an estimated 1,500 in 1989.[5] In 1991, more than 1,700 communities in all 50 states provide legal protection for historic resources.[6] These historic preservation ordinances have proven to be an effective vehicle for protecting and preserving the best of our nation's heritage for future generations, thereby enhancing the quality of life for all. *See Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 108-09 (1978).[7]

The importance of historic preservation has been recognized at the federal level as well. In 1966, Congress enacted the National Historic Preservation Act (NHPA), which established a national policy that "the historical and cultural foundations of the Nation

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[4] *See* National Trust for Historic Preservation, *A Guide to State Historic Preservation Programs* (1976), *cited in Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 107 n.1 (1978).

[5] *See* American Planning Ass'n, *Responding to the Takings Challenge*, Planning Advisory Service Report No. 416, at 23 (R. Roddewig & C. Duerkson eds. 1989).

[6] Statistics compiled by the National Park Service (February 1990), and updated by the National Trust for Historic Preservation (February 1991).

[7] In addition to the 1,700 local jurisdictions that have adopted historic preservation ordinances, every state government has enacted a historic preservation law, as this Court recognized in *Penn Central Transp. Co. v. City of New York*, 438 U.S. at 107. *See also* National Trust for Historic Preservation, *State Systems for Designating Historic Properties and the Results of Designation* (1987); National Trust for Historic Preservation, *State Enabling Legislation for Local Preservation Commissions* (1984).

should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people." 16 U.S.C. § 470(b)(2).[8] The NHPA gives recognition to the critical role of local governments in the preservation of historic resources, through the Certified Local Government program. This program, administered by the National Park Service, allows local governments to share in their state's allocation of federal money from the Historic Preservation Fund if they have enacted comprehensive preservation ordinances that satisfy the criteria spelled out in 16 U.S.C. § 470a(c) and 36 C.F.R. Part 61. According to the National Park Service, 633 communities in the United States qualify as Certified Local Governments.

B. The Washington Court's Ruling Will Severely Disrupt the Regulatory Authority of Local Governments to Designate and Protect Historic Landmarks.

By declaring that the interest in preserving historic properties is "clearly outweighed" by the burden of submitting building plans for secular review, the Washington Supreme Court has effectively exempted religious buildings altogether from preservation ordinances. This decision has several unfortunate consequences.

First, if the view of the Washington Supreme Court is adopted in other jurisdictions, the decision could

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[8] Consistent with this policy, the NHPA strongly encourages the establishment of federal, state, and local programs for surveying and inventorying historic properties and nominating eligible properties for listing in the National Register of Historic Places, the list of districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, engineering, and culture. 16 U.S.C. § 470a.

have the effect of exempting thousands of buildings of historical and architectural significance—many of them true national treasures—from local preservation efforts solely because they are owned by religious institutions.[9] Without effective regulatory protections, there is no practical way for Seattle, or other cities and towns across the nation, to preserve these properties as living parts of their communities. As a result, our nation's religious buildings will become endangered.

Moreover, church buildings are often an integral part—and in many cases, the anchors—of the larger historic districts and neighborhoods that embody our heritage. Exempting religious properties from landmark protection leaves these buildings vulnerable to demolition, paving the way for the construction of parking lots or office towers in their place. The consequences to the physical and social fabric of these historic communities will be severe.

Nor are the implications of the Washington Supreme Court's decision limited to historic preservation. The "burdens" allegedly imposed by the landmark designation of First Covenant Church (i.e., paperwork, "uncertainty," and the necessity of interaction with secular authorities) are hardly unique

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[9] In fact, at least one other court has also been receptive to a free exercise challenge by a religious property owner under a state constitution. *See Society of Jesus v. Boston Landmarks Comm'n*, No. SJC-5415 (Mass. Dec. 31, 1990) (holding that landmark designation of the interior worship space of a church violated the free exercise clause of the Massachusetts Constitution, notwithstanding the fact that the landmarks commission had ultimately permitted the church to make the requested interior alterations.)

to landmark designation. If religious organizations cannot be required to interact with secular authorities and prepare secular "paperwork" except for the most compelling reasons, the authority of local governments to implement land use and other regulatory programs, including zoning laws, will also be threatened.[10]

Finally, the wholesale exemption sanctioned by the Washington Supreme Court is in no way necessary to accommodate changes that may be needed in order for religious property owners to carry out their religious and charitable programs. Like most such ordinances, Seattle's Preservation Ordinance provides a process for evaluating, on a case-by-case basis, proposals for changes to significant features of a designated landmark after the property owner makes a concrete proposal in an application for a certificate of approval. Only in the context of a concrete proposal for altering or demolishing the landmark is there any real ability to determine whether an exception is necessary to provide effective relief to the property owner, or whether alternative solutions may allow the property owner to more effectively utilize its building

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[10] As this Court recently noted in *Employment Division v. Smith*, 110 S. Ct. 1595 (1990):

> The rule respondents favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind. . . . The First Amendment's protection of religious liberty does not require this.

Id. at 1605-06 (citations omitted).

without destroying designated features of the landmark.[11]

Here, the Seattle ordinance provides a flexible administrative mechanism for the review of proposed changes to designated features of the landmark, taking into account the special financial or programmatic needs of the property owner. *Id.* §§ 25.12.490-25.12.660 (App. 59a-67a). Indeed, the designating ordinance for First Covenant Church itself illustrates this level of accommodation. The ordinance specifically requires the Landmarks Board to approve all religiously motivated alterations, i.e., for any exterior alterations "necessitated by changes in liturgy." (App. 83a). Thus, a wholesale exemption from preservation regulation is unnecessary to protect the legitimate interests of the Church.

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[11] For example, in *Rector, Wardens, and Members of the Vestry of St. Bartholomew's Church v. City of New York*, 914 F.2d 348 (2d Cir. 1990), *petition for cert. filed*, 59 U.S.L.W. 3433 (U.S. Dec. 10, 1990) (Nos. 90-899, 90-900), the church's free exercise challenge was raised only after the New York City Landmarks Commission had reviewed and disapproved specific plans by the church to demolish its historic community house. *See also Church of St. Paul & St. Andrew v. Barwick*, 67 N.Y.2d 510, 296 N.E.2d 183, 505 N.Y.S.2d 24, *cert. denied*, 479 U.S. 985 (1986):

> The ultimate resolution of this constitutional issue—i.e., whether the Landmarks Law, as applied, prevents or seriously interferes with plaintiff's ability to carry out its charitable purpose—will require a careful examination of facts not yet developed pertaining to plaintiff's financial situation and to whatever action the Commission takes with respect to plaintiff's rebuilding program.

296 N.E.2d at 190-91 (citation omitted). This was also the rationale of the trial court in *First Covenant*, which concluded that the case was not ripe for review. (App. 30a-31a.)

II. This Case Raises a First Amendment Issue of National Significance.

A. This Decision is in Direct Conflict with Other State and Federal Court Decisions, and Disregards Important U.S. Supreme Court Precedents.

The Washington Supreme Court's decision conflicts directly with a recent decision of the Second Circuit in *Rector, Wardens, and Members of the Vestry of St. Bartholomew's Church v. City of New York*, 914 F.2d 348 (2d Cir. 1990), *petition for cert. filed*, 59 U.S.L.W. 3433 (U.S. Dec. 10, 1990) (Nos. 90-899, 90-900) ("*St. Bartholomew's*"). In that case, the owner of a historic religious building in New York City challenged the landmarks commission's decision denying its request to demolish its landmarked community house in order to construct a 47-story office tower. The court held that the commission's denial of the demolition permit did not unconstitutionally impair the church's ability to carry out its religious mission.[12] *See also Society for Ethical Culture v. Spatt*, 51 N.Y.2d 449, 415 N.E.2d 922 (N.Y. App. 1980) (landmark designation of religious organization's meeting house did not interfere with religious organization's free exercise of its religious activities).

The decision below, while in conflict with *St. Bar-*

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[12] The Second Circuit also held, applying this Court's holding in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), that the landmarks commission's actions did not unconstitutionally "take" the church's property without just compensation under the fifth amendment. The Washington Supreme Court's decision in *First Covenant Church* did not address the church's additional claim that landmark designation, alone, effects a "taking" of the church's property, presumably because *Penn Central* is dispositive on this issue.

tholomew's, in fact poses a broader and more important question. Here the question is whether the mere landmark designation of a church building violates free exercise rights, without regard to whether the property owner has been denied any particular use of the building, or whether the designation will result in actual hardship or interference with religious practice. The decision in *St. Bartholomew's*, by contrast, represents a balancing of competing interests in the context of a specific proposal to demolish a landmark.[13] If the decision of the Washington Supreme Court were correct, the issue in the *St. Bartholomew's* case would never be reached.

The Washington Supreme Court also failed to apply relevant Supreme Court precedents that specifically set forth the appropriate analytical framework for evaluating a free exercise challenge to neutral government regulation. This Court has repeatedly upheld the applicability of a variety of neutral government regulatory programs to religious institutions. These cases confirm that the financial and administrative consequences of landmark designation simply do not create a judicially cognizable burden on free exercise rights. *See, e.g., Jimmy Swaggart Ministries v. California Board of Equalization*, 110 S. Ct. 688, 696-97 (1990) (the free exercise clause does not guarantee that religious groups will be free from all financial and administrative burdens of government); *Hernan-*

[13] While affirming the legitimate authority of local governments to regulate historic religious properties, the *St. Bartholomew's* decision does not close the door on free exercise claims by religious property owners, where a landmarks commission oversteps its bounds and bars an activity central to the property owners' expression of religious faith, or where the owner is unable to use the building to carry out its religious mission.

dez v. Commissioner, 109 S. Ct. 2136, 2147-48 (1989) (disallowance of tax deduction for religious auditing and training services did not constitute a substantial burden on free exercise rights); *Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 304-05 (1985) (recordkeeping and "paperwork" requirements of Fair Labor Standards Act did not burden the free exercise rights of individuals associated with religious foundation).

The Washington Supreme Court disregarded this Court's establishment clause rulings as well. As the Court recognized in *Jimmy Swaggart*, the mere necessity for interaction with the state resulting from governmental regulation does not result in excessive government entanglement under the first amendment. *Jimmy Swaggart*, 110 S. Ct. at 697-99. *See also Tony and Susan Alamo Foundation*, 471 U.S. at 305-06. Thus, the alleged interference with the Church's freedom to alter the exterior of the church structure by requiring proposed changes to be reviewed by the Seattle Landmarks Commission, and any present "uncertainty" such review may engender, cannot be characterized as an infringement of protected first amendment interests.

Finally, this Court's recent decision in *Employment Division v. Smith*, 110 S. Ct. 1595, 1600 (1990),[14] firmly rejected the approach embraced by the Washington Supreme Court of requiring the City to demonstrate a "compelling" governmental interest in

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[14] *Smith* was decided after the Washington Supreme Court's original decision in *First Covenant*, but nearly five months prior to the court's decision to deny reconsideration.

order to regulate historic religious properties.[15] In *Smith*, this Court held that the "compelling interest test" was not applicable to free exercise challenges to valid and neutral laws of general applicability, stating:

> To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the state's interest is "compelling"—permitting him, by virtue of his beliefs, "to become a law unto himself,"—contradicts both constitutional tradition and common sense.

110 S. Ct. at 1603 (footnote and citation omitted). The Washington Supreme Court, by contrast, concluded that the "aesthetic and community values associated with landmark preservation" were "clearly outweighed" by the infringement on the church's free exercise rights. (App. 17a).[16]

The "interference" and "uncertainty" resulting from the landmark designation alleged by the Church in no way burdens or infringes the religious practice of any individual, but merely subjects First Covenant as an institutional property owner to a reasonable,

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[15] The Washington Supreme Court referred to the "compelling interest" test as "strict scrutiny." (App. 10a-11a).

[16] In fact, the Washington Supreme Court did not even correctly apply the compelling state interest test as enunciated in cases such as *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972). The question of whether the government regulation serves a compelling government interest is reached only if the regulation places a "*substantial* burden on the observation of a *central* religious belief or practice." *Hernandez v. Commissioner*, 109 S. Ct. 2136, 2148 (1989) (emphasis added).

neutral, government police power regulation of the exterior of its church building. Accordingly, the injuries alleged by First Covenant simply do not satisfy the standards for first amendment violations established by this Court.

B. Landmark Designation is a Neutral Regulatory Scheme and is Therefore Not Properly Reviewed Under the Compelling Governmental Interest Standard.

The Seattle Landmarks Ordinance is clearly a "valid and neutral law of general applicability" entitled to presumptive validity under this Court's decision in *Employment Division v. Smith*, 110 S. Ct. at 1600 (citation omitted). The question of whether comprehensive historic preservation ordinances place discriminatory and arbitrary burdens on affected property owners has already been decided by this Court in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978):

> In contrast to discriminatory zoning, which is the antithesis of land-use control as part of some comprehensive plan, the New York City law embodies a comprehensive plan to preserve structures of historic or aesthetic interest wherever they might be found in the city. . . .
>
> Equally without merit is the related argument that the decision to designate a structure as a landmark "is inevitably arbitrary or at least subjective. . . ."

Id. at 132 (footnote omitted).

Contrary to the Washington Supreme Court's suggestion, the fact that the Seattle Landmarks Preservation Ordinance is specifically applied to religious buildings does not remove the presumption of validity

that neutral regulatory laws are otherwise accorded. The Second Circuit specifically rejected this view in *St. Bartholomew's*, holding instead that "[t]he Landmarks Law is a facially neutral regulation of general applicability within the meaning of Supreme Court decisions." 914 F.2d at 354. The court explained:

> It is true that the Landmarks Law affects many religious buildings. . . . Nevertheless, we do not understand those facts to demonstrate a lack of neutrality or general applicability. Because of the importance of religion, and of particular churches, in our social and cultural history, and because many churches are designed to be architecturally attractive, many religious structures are likely to fall within the neutral criteria—having "special character or special historical or aesthetic interest or value"—set forth by the Landmarks Law. This however, is not evidence of an intent to discriminate against, or impinge on, religious belief in the designation of landmark sites.

Id. (citation omitted). Because the Seattle Landmarks Preservation Ordinance is a neutral government regulation of general applicability, it should be deemed presumptively valid against the free exercise challenge raised by the First Covenant Church.

CONCLUSION

The danger of the Washington Supreme Court's decision lies in its potential to sanction wholesale exemptions for religious properties from landmark ordinances, without any individualized inquiry into the extent to which the regulations impose genuine hardship or restraints on religious practice. Such exemptions are in no way necessary to protect the legitimate

interests of religious property owners. To the contrary, such exemptions would threaten the authority of local governments to implement land use regulation and, indeed, a number of neutral regulatory programs that may require religious organizations to interact with secular authorities. Accordingly, for the foregoing reasons, the National Trust respectfully requests that the petition for a writ of certiorari be granted.

Respectfully submitted,

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February 8, 1991

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PETITION FOR A WRIT OF CERTIORARI TO
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WASHINGTON

MOTION FOR LEAVE TO FILE AND
BRIEF OF THE MUNICIPAL ART SOCIETY OF
NEW YORK, INC., *AMICUS CURIAE*, IN
SUPPORT OF THE PETITION

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MOTION OF THE MUNICIPAL ART SOCIETY,
INC. TO FILE AS *AMICUS CURIAE* THE
ATTACHED BRIEF IN SUPPORT OF THE
PETITION

The Municipal Art Society of New York, Inc. moves for leave to file its *amicus curiae* brief:

-- to state the other constitutional question presented by the decision below; and

-- to submit that the erroneous answer of the decision below to this question is an additional reason why the petition should be granted.

The Society's brief does not repeat any argument made in the petition.

The other constitutional question presented:

> Is the Establishment Clause of the First Amendment violated by the exemption of a church building from landmark designation based upon the Free Exercise

Clause and the "public benefits associated with the practice of religious worship within the community"?

This question was necessarily (although tacitly) answered in the negative by the decision below.

That the decision below violates the Establishment Clause was argued to the court below in the brief, dated April 10, 1990, submitted by the Society and the National Center for Preservation Law, Inc., *amici curiae*, in support of the request of the City of Seattle for reconsideration; the request for reconsideration was denied without comment on September 12, 1990.

The Society has a real and substantial interest in the outcome of this case. The Society, a New York not-for-profit corporation, was organized in 1892. Its objective is "to work towards the creation of a livable city ... and, particularly, to use the Municipal Arts of Architecture, Landscape Architecture, Planning, Preservation and Public Art to improve and protect the physical environment of New York."

The Society's interest is further demonstrated by its participation as *amicus curiae* in numerous landmark decisions involving issues of preservation law:

Penn Central Transportation Co. v New York City, 438 U.S. 104 (1978);

Rector et al. of St. Bartholomew's Church v City of New York, 914 F.2d 348 (2d Cir.1990) (pet. for cert. pending);

Church of St. Paul and St. Andrew v Barwick, 67 N.Y. 2d 510, *cert. denied*, 479 U.S. 985 (1986);

Matter of Society for Ethical Culture v Spatt, 51 N.Y. 2d 449 (1980); and

Lutheran Church v City of New York, 35 N.Y. 2d 121 (1974).

The written consent of counsel for the petitioner is being filed with this motion. Counsel for the respondent has declined to consent.

The Society's motion should be granted.

February 1991 Respectfully submitted,

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BRIEF OF THE MUNICIPAL ART SOCIETY OF NEW YORK, INC., *AMICUS CURIAE*, IN SUPPORT OF THE PETITION

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WASHINGTON

BRIEF OF THE MUNICIPAL ART SOCIETY OF NEW YORK, INC., *AMICUS CURIAE*, IN SUPPORT OF THE PETITION

The Municipal Art Society of New York, Inc. (the "Society"), *amicus Curiae*, submits this brief:

-- to state the other constitutional question presented by the decision below; and

-- to submit that the erroneous answer of the decision below to this question is an additional reason why the petition should be granted.

CONSTITUTIONAL QUESTION

Is the Establishment Clause of the First Amendment violated by the exemption of a church building from landmark designation based upon the Free Exercise Clause and "the public benefits associated with the practice of religious worship within the community"?[1]

[1]That the decision below violates the Establishment Clause was argued to the Supreme Court in the brief, dated April

ADDITIONAL REASON

This constitutional question was necessarily (although tacitly) answered in the negative by the decision below. The answer was erroneous, and that constitutional error is an additional reason why the petition should be granted.

The essence of the decision below is stated in the penultimate paragraph of the opinion of the court. "Balancing" the two interests, the court held that "the aesthetic and community values associated with

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10, 1990, submitted by the Society and the National Center for Preservation Law, Inc., *amici curiae*, in support of the request of the City of Seattle for reconsideration; the request for reconsideration was denied without comment on September 12, 1990.

landmark preservation" are "clearly outweighed by the constitutional protection of free exercise of religion and the public benefits associated with the practice of religious worship within the community." (App. 18a)

This balancing and this weighting of the scales to exempt property owned by a religious organization from neutral regulation departs from the neutrality and secular purpose required by the Establishment Clause. Texas Monthly, Inc. v Bullock, __ U.S. ___, 109 S.Ct 890 (1989); Lemon v Kurtzmann, 403 U.S. 602, 612-13 (1971); Abingdon School District v. Schempp, 374 U.S. 206, 226 (1963); Engel v Vitale, 370 U.S. 421, 430

(1962); cf., Hernandez v Commissioner, ___ U.S. ___, 109 S.Ct. 2136, 2146-47 (1989).

While creating an exemption for property owned by a religious organization on the basis of the "public benefits associated with the practice of religious worship within the community," the court deprecated "aesthetic and community values associated with landmark preservation...." Aesthetic values, however, constitute a branch of philosophy and doctrine[2] as important (to identify only some of those

[2]"Aesthetics" and "aestheticism" are "a branch of philosophy dealing with beauty..." and "the doctrine that the principles of beauty are basic and that other principles (as of the good or the right) are derived from them..." *Webster's Third New International Dictionary* (1971).

interested) to the atheist and the agnostic as a house of worship may be to some, but not all, theists.

The Establishment Clause forbids the analysis made by the court below. "The First Amendment leaves the Government in a position not of hostility to religion but of neutrality. The philosophy is that the atheist or agnostic – the nonbeliever is entitled to go his own way." Engel v Vitale, *supra*, 370 U.S. at 443 (Douglas, J. concurring).

CONCLUSION

The petition for a writ of certiorari should be granted.

February 1991

Respectfully submitted,
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